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RECORD EXTRACT OF APPELLANT

IN THE
APPELLATE COURT
OF MARYLAND

September Term 2023,
No. 61

JUSTIN HOLDER

Appellant

V.

BENJAMIN ESTES

Appellee

Appeal from the Circuit Court of Washington County
The Honorable Andrew F. Wilkinson

RECORD EXTRACT

Volume 2

JUSTIN HOLDER
APPELLANT

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

BENJAMIN ESTES *

Plaintiff *

v. * **CASE NO. C-21-CV-20-430**

JUSTIN HOLDER, et al. *

Defendants *

TRANSCRIPT OF PROCEEDINGS

(PRELIMINARY INJUCTION HEARING)

(VOLUME 2 – DAY 2)

Circuit Court

Hagerstown, MD

December 16, 2022

at 9:27 a.m.

Before:

The Honorable Andrew F. Wilkinson

Appearances:

Alyse Prawde, Esquire, attorney for Plaintiff, Benjamin Estes; and

Justin Holder, Defendant, pro se; and

Brandy Peeples, Esquire, attorney for Defendant, Deena Holder.

Transcribed from electronic recording by:

Linde M. Cessna, Court Reporter

Circuit Court for Washington County, Maryland

The Court House

Hagerstown, Maryland 21740

240-313-2564

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P R O C E E D I N G S

THE COURT: Ok, we're on the record for C-21-CV-20-430. This is the matter of Estes versus Holder, et.al. We finished yesterday with Mr. Estes on the witness stand under cross-examination by Mr. Holder. Is that where we're starting today?

MR. HOLDER: Please, Your Honor.

THE COURT: Okay, Mr. Estes, please come take the witness stand. And you will be sworn again.

TESTIMONY OF BENJAMIN ESTES

Benjamin Estes, having been duly sworn, did testify as follows:

CROSS EXAMINATION

BY MR. HOLDER:

THE COURT: Sir, if you would, before Mr. Holder starts would you give us your name and address again?

A. Sure. Benjamin Niu Estes, 22 Mt. Hebron Road, Keedysville, Maryland, 21756.

THE COURT: Thank you, sir. Okay, Mr. Holder.

Q. Thank you, Your Honor. Alright, Mr. Estes, how are you this morning?

A. I'm well.

Q. I'm going to ask you about - - I think at one point you had talked about a log trimmer or something you had gathered in the creek that you had possession of.

A. No, I had said that there are logs, that there are trees that exist on the east bank entirely on my property that had protruded across the creek and those trees had been cut in the middle of the creek. I believe that's what my testimony was.

Q. Were there logs - - Do you believe there's logs that had fallen in the creek from those trees?

A. I don't know what happened to those logs. I would assume that those logs after they were cut, yes. But I can assure you that those trees were there when I bought the property and then miraculously were cut and disappeared after you moved in.

MS. PEEPLES: Your Honor, objection.

THE COURT: Overruled.

Q. But you don't know what happened to the actual logs that, that you say are cut? You don't know where they went?

A. Um, I don't know. I believe - - I mean - - There were some cut logs that existed for a while on in the water but I have no idea what happened to those things, no.

Q. Did you see any drag marks where they got drug up the bank or any machinery coming down pulling them out?

A. No.

Q. Did you think they floated downstream?

A. I have no idea what happened to them Mr. Holder.

Q. Would it be possible for a log to float down that stream?

MS. PRAWDE: Objection. If I can be heard?

THE COURT: Go ahead.

MS. PRAWDE: It's just line of questioning is just outside the scope of, it's not relevant outside the scope of what we're dealing with today. It gets into the bifurcated matters related to the truths.

THE COURT: I don't think so. I think what he's getting towards is can it be used for commerce floating logs down the stream and this is the property owner so I will overrule the objection. You may answer, if you know the answer.

A. Logs in storms like we had yesterday, Your Honor, sure, logs can go down that stream of varying sizes, large trees, small trees. But during the regular, I mean, almost every day, no. Logs typically can't just float down that stream and they'll become obstructed. I would like to note that I actually went out there last night at 11:15 p.m., walked across the ford in the creek, in Spring Creek, Your Honor, without the water coming over my boots.

THE COURT: That's good. Next question.

A. Very well.

Q. Okay. Um, so I'm going to show you a picture you produced if you want to take a peek at it. That's Defendant's exhibit 13.

(Defendant Holder's exhibit 13 was marked for identification.)

THE COURT: Is this a new exhibit?

MR. HOLDER: It's a new exhibit, yeah.

THE COURT: Okay.

Q. Is that a picture you recognize as being what we've been calling the upper railroad bridge in the area of rocks, you said you could walk over without getting your feet wet?

A. Yes.

Q. Is there a log up at that area?

A. Yes.

Q. When you went out last night did you see the log there?

A. No. Uh - -

Q. Has a log washed down the stream since?

A. Well, I actually went here this morning and I walked across the creek at the base of this big pool, Your Honor. Again, it was not over my boots across the entire length. But I don't remember seeing that particular log there today, no. But I assure you that I

walked across this creek, this morning, at the base of this pool without getting water over my boots.

Q. Okay. And - -

THE COURT: Are you asking to admit this photograph?

MR. HOLDER: May I admit Exhibit 13?

THE COURT: Where did it come from?

MR. HOLDER: This is in Estes 0 - -

THE COURT: So, provided through Estes discovery responses?

MR. HOLDER: Yes.

THE COURT: Okay.

Q. Did you take this picture?

A. I assume I did.

Q. Okay.

THE COURT: Any objection to the admission of 13?

MS. PRAWDE: No objection.

MS. PEEPLES: No.

THE COURT: 13 will be admitted.

(Defendant Holder's exhibit 13 was admitted into evidence.)

THE COURT: And this is down at the southern portion near the railroad bridge?

A. That's correct, Your Honor.

THE COURT: Okay. Where do you need him?

COURT REPORTER: Anywhere near a mic. He can't stand in the middle because it's hard to pick him up.

THE COURT: Okay.

MR. HOLDER: I have a tendency to do that. I apologize.

THE COURT: No, it's okay. If you're going to be standing because you need to work with exhibits just sort of stay close to the podium, okay?

MR. HOLDER: Yes, sir.

COURT REPORTER: Thank you.

MR. HOLDER: I apologize.

THE COURT: No problem.

MS. PRAWDE: As long as you just show me the exhibits before you hand it up. Thank you.

MR. HOLDER: Okay.

Q. Mr. Estes, you talked about ford in the creek. I want to hand you Defense Exhibit 14. Is that approximately the area of the ford in the creek you're standing in?

(Defendant Holder exhibit 14 marked for identification.)

A. No.

Q. Where is that picture taken at, sir?

A. This is slightly down the stream with the ford in the creek.

Q. Did your wife take that picture of you?
A. Uh, yes. I believe so.
Q. Do you know where - - Do you remember that picture being taken?
A. This particular picture? I don't know if my wife took it or if my daughter took it, to be honest with you. I can't remember who took it.
Q. Is that on your property here?
A. Yeah.
Q. On this lot 2?
A. Absolutely. Sure is. And it's barely over my ankles there.
MR. HOLDER: Move to admit Exhibit 14.
A. That's Spring Creek, Your Honor.
THE COURT: Any objection to 14?
MS. PRAWDE: No objection.
THE COURT: It appears to be a photo of Mr. Estes standing in Spring Creek according to him.
A. That's correct. And if you would like to know where it is it's between the ford in the creek and my little footbridge in the creek.
THE COURT: Okay. And the ford at the creek, the ford of the creek is that at the top?
A. Generally, where your - - A little to the right of where your finger is.

THE COURT: Okay. So - -

A. And that's taken right as that goes around the bend there.

THE COURT: Okay. So, the ford is between the town of Keedysville corner - -

A. Yea.

THE COURT: - - and the northern most point.

A. Yeah, generally speaking.

THE COURT: Got it.

Q. So, Defendant's exhibit 14, the picture of you, you just described to the judge, is that, is this picture upstream I'm going to call it, from the footbridge?

A. Um - -

THE COURT: What does upstream mean?

MR. HOLDER: To the east.

THE COURT: Okay, let's call it that.

MR. HOLDER: Okay. To the east of the bridge.

THE COURT: Okay, I know what you mean by upstream now, okay.

A. Yes.

THE COURT: I think his answer - - Where he just explained the ford to be is definitely east of the footbridge.

Q. Okay, and is that, that's where you said the water, the deepest could find is six inches?

A. No, that's not what I said that's the deepest you could find it six inches. I said that was in the ford of the creek.

Q. Is that - - Isn't the ford where you put the ruler?

A. Yeah.

Q. The picture of the ruler?

A. This isn't necessarily the same area. Look - -

Q. No, I'm asking you a different question. I'm sorry.

THE COURT: Hang on Mr. Holder. You want to be careful about talking about where he put that ruler because I did not allow those exhibits in. You start asking him about those rulers, I'm going to allow those exhibits in.

MR. HOLDER: Okay.

THE COURT: If you're going to ask him a question about where did you put the ruler that it shows six inches, then those pictures are coming in. Do you understand? It's called opening the door.

MR. HOLDER: I think we're getting them in then.

MS. PEEPLES: I'm going to object, Your Honor.

THE COURT: I'm - - This is Mr. Holder's case at this point. Do you understand what I'm saying to you?

MR. HOLDER: I do. I mean he put a ruler in the

creek. I think it's - - I mean it has to have some value of evidence (unintelligible).

THE COURT: I get it. But I have already exclude - - I did not accept them into evidence because they were late with respect to the discover rule.

MR. HOLDER: I'll withdraw.

THE COURT: He acknowledged that he took it in October and therefore I kept those photos out. But if you keep going down the line of questioning of is this where you put the ruler then - -

MR. HOLDER: They got to come in.

THE COURT: - - they become, they become far more relevant and Ms. Prawde is going to say you've opened the door. So, you need to make a strategic decision right now how far you want to go with this.

MR. HOLDER: Out of respect with my co-counsel I'll withdraw my question.

THE COURT: I think that's why she objected. Keep going.

MR. HOLDER: Um, I listen to my wife, Your Honor.

THE COURT: Say that again?

MR. HOLDER: I said I listen to my wife.

THE COURT: I hear you. Move closer to mic.

Q. So, when you were - - Is this generally the same area there, Mr. Estes?

THE COURT: And we're looking at Exhibit 14?
Q. Exhibit 15.
THE COURT: Oh, are we on 15 now?
MR. HOLDER: This is 15, yes.
(Defendant Holder exhibit 15 was marked for identification.)
THE COURT: Okay.
A. It's generally the same area, yes.
Q. Is the water a little deeper there maybe over your boots?
A. Yeah. Actually, these pictures were taken at a different time then when I had the ruler in my hand.
THE COURT: I know that.
A. Um, I'm clearly wearing different clothes so.
THE COURT: I know.
A. Very well. So, yeah, this is a little deeper but this is not at the ford in the creek, no.
Q. Do you think a log would flow through there?
A. Uh, certainly it might be able to float here just depending upon the size of the log but certainly it wouldn't get past the areas just below this or just above it. It's very, very shallow.
Q. What if I waited until it rained?
A. Look, Mr. Holder, I was just upstream with this

this morning after a major, major rainstorm and I walked across that creek without getting my feet wet and boots that don't even come up to my knee. So, if you want to sit here, excuse me, and argue about whether or not a log can float down in a flood, you can float a bus down a creek in a flood. Does that make it navigable year round?

THE COURT: Alright, you've answered the question. You've answered the question. Next question.

Q. Okay, so - -

THE COURT: His answer is maybe but it wouldn't go very far.

Q. Okay, so, if I was over in the town of Keedysville property and I'm on exhibit 1 - -

A. I can't see where you're pointing, sir.

Q. I'm sorry.

THE COURT: Okay, why don't you just move the easel so - - Just move the easel. Mr. Kauffman, can you help?

MR. KAUFFMAN: That's a tricky easel.

Q. Can you see that now, Mr. Estes?

A. Yes.

THE COURT: Before we go, before we go, Exhibit number 15, do you want that in evidence? It's the picture you were talking to him about.

MR. HOLDER: I move to admit Exhibit 15?

THE COURT: Okay. Any objection to 15?

MS. PRAWDE: No objection.

THE COURT: 14 and 15 will be admitted.

(Defendant Holder's exhibit 14 and 15 will be admitted into evidence.)

MS. PRAWDE: Your Honor, may I approach the easel so I can see?

THE COURT: Of course.

MS. PRAWDE: Thank you.

THE COURT: Counsel if any of you want to move around the courtroom to see you are certainly welcome to do that. (Attorneys approach the well of the court to look at easel.)

Q. Um, if I was over here in the town of Keedysville where it says Liber 332 Folio 50 at that property - -

THE COURT: Point your finger to it. Okay, so we're talking about the town of Keedysville property that is right in the middle of Plat 9186.

Q. And I just cut myself down two hundred thousand dollars' worth of the towns white oak trees, timber, quality merchantable timber. And I wanted to get that over to my friend Brian Smith. Do you know where Brian Smith lives and has property?

A. I know generally where he lives, yes.

Q. And he was going to make some furniture for me and I wanted to ship it over to him. If I waited till it rained hard, would I be able to get those logs from this property over to Brian Curtis Smith?

THE COURT: Can you tell me where Brian Smith lives generally? Is he in town or - -

MR. HOLDER: Generally, to the west of Uncle Eddie's Broke Down Palace.

THE COURT: Okay. I think between Main Street and Uncle Eddie's Broke Down Palace.

MR. HOLDER: Okay.

MS. PRAWDE: I'm going to object.

MS. PEEPLES: I'm going to object as well.

THE COURT: Sustained.

(Counsel move back to trial tables.)

Q. Do you know the depth of trailblazer, sunfish, kayak or a field and stream eagle kayak draft in the water? Do you understand the term draft?

A. I generally understand the term draft and no I do not know how much draft they pull. No. But I do want to say one other thing while you're asking me about the depths, um, yesterday I said that I only measured the depths I think on the one occasion that was shown in the pictures. But I actually forgotten. I had a broken meter stick at a different time and gone out on the day I

believe when my daughter took those pictures. This is just a broken old meter stick and I took measurements then too and the measurements were all the same, Your Honor, and that was at a different time. So, I don't want - -

THE COURT: The same meaning what?

A. The same in most areas not over my, my ankles. Generally, you know, deepest spots six inches but you can walk across it certainly.

THE COURT: Okay. Thank you.

A. Very easily.

Q. If I told you a kayak drafts three and a half inches would that seem reasonable for you as a layman?

A. I don't know what the true draft is. In unfloated and unincumbered kayak drafting three and a half inches, sure. Well, you put a two hundred pound man in it my guess is it's going to pull more than three and a half inches. So, alone, unincumbered, unweighted, it might pull three and a half inches. I can assure you that I have kayaked in a kayak myself down the big Antietam Creek and it certainly drew more than three and a half inches.

Q. Did you ever hit the bottom?

A. Yes.

Q. And in the, uh, the weight of a log compared to

the weight of a man in a kayak, which one is heavier?

MS. PRAWDE: Objection.

MS. PEEPLES: Objection.

THE COURT: Sustained. It assumes a lot in that question.

Q. Do you know how much a twenty foot length of walnut sixteen inches in diameter weighs approximately?

MS. PRAWDE: Objection.

THE COURT: How would he know that, Mr. Holder?

MR. HOLDER: I think it would be part of what you would have to know as a layman in order to determine if the log could or could not go down a creek. And we're saying he could get - -

THE COURT: His testimony - - His testimony so far is, yeah, there might be portions where a log can float but there are portions where you never get a log through all the way through unless it was a torrential rainstorm. Do you understand what I'm saying? He has agreed that in a torrential rainstorm you could maybe get logs through. But in, on a normal day there still might be some places that a log could float. But there are certainly places that it cannot, it can't get by. It just can't.

MR. HOLDER: Okay.

THE COURT: That's his testimony so far. So, what's it matter whether he knows how much a twenty foot piece

of wood weighs?

MR. HOLDER: Well, we're going to have to go like really deep into each specific portion of the creek and why I can't get through because I have all the pictures of the creek here. And, you know, it's my intention to show that he's basically not giving true testimony which you can get logs all the way down the creek and - -

THE COURT: Then get all the pictures into evidence first.

MR. HOLDER: Okay.

THE COURT: And then you can make your argument that he's wrong.

MR. HOLDER: Okay.

THE COURT: And you're right because you can get logs through there but I've seen a lot of pictures already where I have to admit to you there appear to be some places in the pictures I've seen so far that you would not be able to float a log.

MR. HOLDER: Like I said he cherry-picked those.

THE COURT: No, no, it's not about cherry-picking. Okay. The question that you're driving at is navigability of the creek, which I will remind you in your opening statement yesterday you told me your argument is navigability isn't the issue. You think the issue is other things. I asked you.

MR. HOLDER: I do.

THE COURT: Okay. You're spending a lot of time on navigability. You're allowed to do that. If you want me to see pictures that show different conditions than all the pictures I saw yesterday then get those pictures in evidence first rather than ask your big broad question which sounds to be does he think that you can float a log.

MR. HOLDER: Okay.

THE COURT: His answer may still be no but I'm going to be the one to decide whether you can float a log.

MR. HOLDER: Okay.

THE COURT: And whether floating a log really leads to a finding of navigability.

MR. HOLDER: Understood.

THE COURT: Okay. Are you with me?

MR. HOLDER: Yes, sir.

THE COURT: Alright, why don't you work on the pictures first?

Q. Do you recognize that picture that being the area you've been calling the big pool?

A. Yes.

THE COURT: Is this 16?

MR. HOLDER: This is Defense exhibit 16.

(Defense exhibit 16 was

marked for identification.)

A. I don't know if Ms. Prawde wants to see that or not.

THE COURT: Okay.

Q. Did you take that picture?

A. I believe so.

THE COURT: Was this through discovery?

Q. Did you provide it in discovery, sir?

A. Yes, Estes 443?

THE COURT: Any objection to 16?

MS. PRAWDE: Your Honor, I'm sorry. I haven't seen it. Thank you.

Q. Mr. Estes, can you see the bottom of the creek in that picture clearly?

A. I can see areas of the bottom, yeah.

Q. How about out in the center? Can you see the bottom?

A. Not clearly, no. But I know it's there. I've actually weighted this whole thing, not (unintelligible).

THE COURT: Not over your what?

A. Not over my head. And I'm 5'6".

THE COURT: What area is this?

A. This is the big pool.

THE COURT: Which you've already testified you can sort of swim in.

A. Yes.
THE COURT: Theoretically swim in.
A. Yeah, yeah.
Q. If you look back at those rocks you said you walked across and never got your feet wet.
A. Um hum.
Q. Do you think when the water is the level it is in that picture you could still walk across without getting your feet wet there?
A. Probably, yea.
THE COURT: Are you asking to admit 16?
MR. HOLDER: Admit 16.
THE COURT: Any objection?
MS. PEEPLES: No objection.
THE COURT: 16 is admitted.
(Defendant Holder's exhibit 16 was admitted into evidence.)
Q. Are you familiar with that area being slightly to the north of big pool?
A. Yes.
THE COURT: Hang on a second. Are you handing him exhibit number 17?
MR. HOLDER: That's Defense exhibit number 17.
(Defendant Holder's exhibit

17 was marked for identification.)

THE COURT: Okay. Can you identify where that is?

MR. HOLDER: Can you identify it?

A. Yes.

THE COURT: When?

A. This is at the base of the big pool. I was actually here at this very spot this morning after a deluge yesterday and walked across it. And it was not over my boot tops.

THE COURT: Is this the south end of big pool?

A. Yes.

THE COURT: South end big pool, okay.

A. I actually walked all the way across to the other side there.

Q. But in this picture is thee a separate channel to the west side of the creek, there's an island in the center?

A. Yea, but these big, these big sycamore trees you see here, Your Honor, I believe on one of my plats I think it's 9186, they identified specimen trees, which are on my property. I believe that these two are specimen trees, which have been identified in plat 9186 as being included entirely on my property.

THE COURT: What is a specimen tree?

A. Um, you'd have to look at the - -

THE COURT: That's okay.

MR. HOLDER: I don't think (unintelligible).

THE COURT: That's okay. No, you don't need to.

A. When Fred Frederick performed his - -

THE COURT: Well, don't tell me something that he said. Okay.

A. No, it's reported in the Land Records of Washington County as part of plat 9186.

THE COURT: Okay.

MR. HOLDER: It's a schedule of trees that are they've located large merchantable type trees.

THE COURT: Okay. That's what specimen means. I was just curious what specimen means. Okay. Um, so that picture is south end of big pool number two. Any objection to 17?

MS. PRAWDE: No objection.

THE COURT: It will be admitted.

(Defendant Holder's exhibit 17 was admitted into evidence.)

Q. That deeper trough on the west side could you float a log down through there?

A. I mean it depends on what size log Mr. Holder. You have to define what a log is. Could a tree with a

root system grow through there, no. Could a small log this big by maybe this big that wasn't dry rotted?

THE COURT: He's indicating 6x6 inches.

A. 6x6 inches. A 6x6x6.

THE COURT: No, I'm sorry. You're saying 6 inches diameter?

A. Yeah, if, if that could flow through potentially but probably not without hitting land. No, it depends on how waterlogged it is. If it's gotten branches on it. Um, what obstructions are there. But I've walked across that this morning. Whatever you want to call that little channel over there. I walked across it this morning. There were no logs floating through there. There was no debris floating through there. There were no sticks flowing through there this morning when I walked across and it wasn't above my calf. Um, and if the Court really wants to see pictures of the entirety of the creek my deposition by Mr. Holder, I actually videotaped the entire area. So, if you'd like to introduce that for the Court, I don't know what day that was but the Court could certainly take a look at that too if you would like. And you also have the video that you took Mr. Holder showing - -

THE COURT: Hang on, hang on, Mr. Estes.

A. Sure.

THE COURT: Let's stop the answer.
A. I apologize.
THE COURT: You answered the question.
A. Very well.
Q. So, your answer was you could get a log through that shoot on the west side?
A. No, that's not - -
THE COURT: No, I think his answer was, no you could not.
MR. HOLDER: A 6x6 he said.
THE COURT: He said maybe a 6 inch diameter.
A. Maybe, depending - -
Q. So, the answer is you don't know?
A. Depending - -
THE COURT: I don't think that's his answer at all. He said maybe a 6 inch diameter but nothing, nothing bigger.
MR. HOLDER: Move to admit exhibit 17.
THE COURT: Any objection to 17?
MS. PRAWDE: No objection.
(Defendant Holder's exhibit 17 was admitted into evidence.)
THE COURT: Quick question on number 17.
A. Yes, sir.

THE COURT: Here in the water, I see some, some light spots. Is that rocks?

A. Those are rocks, Your Honor, yes.

THE COURT: Got it thank you.

A. That's the bottom.

THE COURT: Defendant's 18?

Q. (Unintelligible) Defendant's 18.

(Defendant Holder's exhibit 18 was marked for identification)

A. Yes.

THE COURT: Ask him where is it.

Q. Do you know approximately where that is?

A. This is up near the railroad bridge above it.

THE COURT: So, this is at the south end of the stream as shown on 9186?

A. That's correct.

THE COURT: Okay. You all keep saying up at the railroad. And I know that's because you all live in that area so that might be up to you. In my brain the railroad is down because it's down on 9186. When you say upstream I think we're going up north. Okay.

A. Understood.

THE COURT: Got it. So, we're at the bridge.

A. Um hum.

THE COURT: Okay.

Q. Alright, do you see a survey flag in the picture?

A. I do.

Q. Is that survey flag do you believe it marks the southwest corner on plat 9186?

THE COURT: Southwest corner.

A. Um, no I don't think so. I don't know. Fred Frederick, to my recollection, placed that there I think on my survey. On that survey it says that there's an iron pin found. But I'm not sure that he found that pin. So, this here is, it's, I don't think it's a pin. He didn't drive an iron stake in there. I think it's just a wooden stake and I forget what he wrote on it. I might say - - I can't remember what he wrote on it.

Q. But would it be fair to say that that flag delineates this property corner here is why that flag is there for this southwest property corner by the abandoned railroad and where it joins Uncle Eddie's property? Is that - -

A. Like I said, when Fred comes out he can drive a stake in the ground a metal stake which is an iron pin. I'm trying to answer your question, Mr. Holder.

Q. (Inaudible)

A. I don't know exactly what point he defined that as. A lot of these things are points online.

THE COURT: His answer is he does not know what that flag represents.

A. It may be a point on a line. You'd have - -

Q. Okay. Who would I have to ask Mr. Estes?

A. I don't know who you'd have to ask.

Q. But you don't know where the property line is.

A. I know where my property line is, yeah. I marked - -

Q. Okay, is that flag on the corner of your property line?

A. It is on - - It is either the property line or on a line associated with my property line. There are points - -

Q. Is a property corner - -

A. - - on a line which Fred and other surveyors marked. They don't necessarily mark the corners with flags is my understanding. They can flag trees for example that are points on a line. They can place a metal, anything, and hang a flag or whatever they do. They don't necessarily mark a very specific point on any plat. It can be a point on a line. So, I don't know. But I know, yes, that if I as a layman am saying, and if the Court wants me to answer this, yeah, I would say that that's generally in the area where it says that iron pin is found, yes.

Q. Yes, that was the answer I was looking for. And does that flag generally appear in the photo to be north of what you've been calling the rocks that you have been walking across?

A. No. Oh, does that - -

Q. Yea, north.

A. No, that's south of where I call the rocks. Or right in the middle you can see a big rock right there. You can see big rocks all over the place.

THE COURT: Why don't we do this? Exhibit 18 is there any objection to exhibit 18?

MS. PRAWDE: No objection.

THE COURT: Okay, do you want exhibit 18 admitted?

MR. HOLDER: Let's admit exhibit 18.

THE COURT: Very well. 18 is admitted.

(Defendant Holder's exhibit 18 was admitted into evidence.)

THE COURT: As I'm looking at it, is that the flag right there, the little orange thing?

MR. HOLDER: That was the flag I was asking the witness about, Your Honor.

THE COURT: Okay. And so, this picture, correct me if I'm wrong Mr. Estes, is taken from the east bank?

A. That's correct.

THE COURT: Looking south towards the west bank?
A. That's correct.
THE COURT: There's a stake there in the south bank roughly?
A. That's correct.
THE COURT: Are these rocks across the creek the same rocks that I'm seeing in all of the other photos concerning where the bridge generally is?
A. Yes. Now there may be some more exposed now.
THE COURT: Okay.
A. There may be some which are under water.
THE COURT: Okay. But - -
A. But generally, those are very large boulders that are still there, yes.
THE COURT: Is there another formation of rock further south or is this the formation of rocks that I see in all the other photos of where the bridge generally is?
A. That is further south. I don't own further south.
THE COURT: Okay.
A. Than the general location where that property marker is so - -
THE COURT: Okay. Mr. Holder asked you a question yesterday that if you were standing at this stake looking

east to the fence that runs on the railroad property he asked you whether the rocks would be on your right or left and you said well it be on both. That was your testimony.

A. Yep.

THE COURT: Is this the area that you're talking about when you said, well the rocks would be on both sides?

A. Yes. Yeah.

THE COURT: Okay.

A. And what this picture doesn't show and can't show necessarily is that leading up to this boulder it's not like there's just this boulder field that comes up out of nowhere. There are rocks and boulders maybe submerged this deep which may come out of water, may be under water, to the south of this as well. Yeah, large, big boulders.

THE COURT: Do these sort of boulderly type rocks are they in the water to the south and to the north here?

A. Yeah.

THE COURT: And they're just under water?

A. Just under water.

THE COURT: Or they could be a foot under water. They could be two feet under water.

A. That's right.

THE COURT: Until you get to the big pool.

A. That's right. Generally speaking, if you were to travel on the state property, well what I understand as the state property, that would flow underneath the washed out railroad above it. There is a large pool up in there, yes, there is. And but that's, you know, not on my property and that goes up towards Mr. Young's property to the south.

THE COURT: Okay, was 18 admitted?

MR. HOLDER: Yeah, we admitted 18.

THE COURT: Do you have any other questions about 18 based on what I just asked?

MR. HOLDER: No, you asked what I wanted.

THE COURT: Okay.

Q. This is Defendant's exhibit 19. Do you recognize that as a picture you took in approximately the same area of rocks with your dogs in it?

(Defendant Holder's exhibit 19 was marked for identification.)

A. Yep.

Q. Would you say that's the time of the year the water is potentially deeper than normal or is that about average water depth?

A. I'd day this is deeper than usual, yes.

Q. How many times a year - - That's in the winter? Is that correct, that picture?

A. Winter, Fall. Don't know it could be early spring. Not in the Summer it doesn't look like.

Q. Is the creek generally the deepest in the early Spring or is it - -

A. Um, I would say that the creek is generally deepest about this time of year. But, you know, between now and Springtime, generally speaking.

Q. And that's a picture of the rocks at the south end of plat 9186 that we've been talking about that you walk across?

A. Um hum, yeah.

MR. HOLDER: Move to admit Defendant's exhibit 19.

THE COURT: Any objection to 19?

MS. PRAWDE: No objection.

THE COURT: 19 will be admitted.

(Defendant Holder's exhibit 19 was admitted into evidence.)

Q. Hand you another picture. Did you take that picture?

(Defendant Holder's exhibit 20 was marked for identification.)

A. Yes.
Q. Is that a picture looking north from the abandoned railroad here on plat 9186 down the creek?
A. Yes it is.
Q. Okay, does it appear to be Fall in that picture?
A. Yes.
THE COURT: When you say down the creek, you mean to the north, right?
MR. HOLDER: To the north.
THE COURT: So according to 9186 we're looking up the creek?
MR. HOLDER: Up.
THE COURT: We're looking up 9186.
MR. HOLDER: We're looking up 9186.
THE COURT: Okay to the north.
A. Down, downstream.
THE COURT: Okay, which way does the water flow? South to north?
A. Yes.
THE COURT: Okay, south to north.
MR. HOLDER: Yes.
THE COURT: Okay. What was your question? I think your question is does this appear to be taken in the Fall?
MR. HOLDER: Yeah.

A. Yes, and yes.
Q. Okay. Alright. And I'll move to admit.
THE COURT: Any objection to 20?
MS. PRAWDE: No objection.
(Defendant Holder's exhibit 20 was admitted into evidence.)
THE COURT: And this is standing near the bridge looking north?
A. That's, that's correct.
THE COURT: And are these the same rocks that I've seen in - -
A. Yes, that's the same - -
THE COURT: - - all the other photos?
A. You can see my no trespassing sign that's been posted there.
THE COURT: Okay.
A. It's been there for years and years.
Q. I'm going to hand you another picture. Is this a picture you took Mr. Estes?
(Defendant Holder's exhibit 21 was marked for identification.)
A. Yep.
THE COURT: Go back to the microphone.

A. Yes.

THE COURT: No, not you. Mr. Holder.

Q. Okay, and you recognize the area in that picture?

A. Yes.

Q. Could you describe the area to the Court please?

A. Yeah, this is, um, generally in the area where we were talking about yesterday on plat 101955 where there's a small protrusion on that plat that appears to go out to an area in at a point and space in the Little Antietam Creek.

THE COURT: And is this 10 - - Is this Exhibit 21 in your hand?

A. Yes, Your Honor.

THE COURT: Okay.

MR. HOLDER: Okay, and I'll move to admit 21.

THE COURT: Any objection to 21?

MS. PRAWDE: No objection.

(Defendant Holder's exhibit 21 was admitted into evidence.)

THE COURT: In this general location is if I were looking at 10955, plat 10955?

A. Yes.

THE COURT: There's a stake in the photo?

A. Yes. Yes.

THE COURT: Is this the stake here or here?

A. Uh, it was at the end of L, at the end of L-5. Sort of looks like it's in the creek there.

THE COURT: At the end of L-5?

A. L-5 if my memory - -

THE COURT: That's his testimony that it's at the end of, what is marked as L-5. I think L-5 is off of 9186, right?

(Cross talk between parties.) (Unintelligible)

THE COURT: Hang on. L-5 is off of 9186. Okay.

A. (Unintelligible)

Q. Does that stake appear to be generally in the center of the two banks of the creek?

A. No. I mean - - No.

Q. Is it closer to the east bank?

THE COURT: Well, which way are you facing in that photo?

A. Your Honor, I am, um, facing this would be downstream so I am facing - -

Q. North.

A. - - in this picture I am facing north, that's correct.

THE COURT: Facing north.

A. My back is to the south and the railroad bridge.

THE COURT: Understood.

A. And I would be facing north.
THE COURT: Got it.
A. So, your question Mr. Holder?
Q. Do you - -
DEPUTY: Sir?
THE COURT: Hang on Mr. Holder.
DEPUTY: There is a Mr. Nagle out in the hallway said - -
MR. HOLDER: He can come in he's an expert.
THE COURT: He can't come in.
THE COURT: Why would he be able to come in?
MR. HOLDER: I thought experts could sit during to hear the facts.
THE COURT: What's he testifying as an expert today?
DEPUTY: He said he was not subpoenaed to be here. He was asked to be here by Mr. Holder.
THE COURT: Okay. What does he - - What are you planning to offer his testimony as an expert for?
MR. HOLDER: He testified in depositions that (unintelligible) Public Highways Mr. Neil asked him do you have any facts. He said I don't have any factual information to provide so it was just be his expert opinion on how you determine navigability of a creek. So now we know how his case he's trying to prove.
THE COURT: Based on case law?

MR. HOLDER: Based on case law. And if he sits here and hears the facts of the witnesses his opinion may change. His opinion of navigability same as I believe Mr. Joliet did in the *Young* case.

THE COURT: Oh, I know experts can sit in that's not my concern. My concern is, and maybe I'm jumping the gun a little bit.

MS. PRAWDE: If I can be heard at this time, Your Honor?

THE COURT: Yes, ma'am.

MS. PRAWDE: Your Honor, we preclude Mr. Nagle from testifying at all as a lay person or as an expert here. Mr. Nagle was designated as an expert by Mr. Holder as a rebuttal expert. The expert designation all discovery specifically said he was going to be testifying about his report, which was a boundary survey that he drew up, which strictly deals with where the boundary line was. His testimony as an expert was specifically limited to that. Um, at his deposition he was asked if he knows if Little Antietam Creek is suitable for transport. He said that is not a question he can answer as a lay person or as an expert. He also has additional testimony related to navigability where he said that it is not navigable. Um, he has no expert or lay opinion as to this. He should be precluded completely from this trial.

THE COURT: Do you wish to be heard Mr. Holder? Just stay close to the microphone.

MR. HOLDER: I mean, my recollection of the deposition is he said the creeks are the Public's Highways. And forming what we provided as an opinion was simply his boundary survey, how he came to that opinion. They had an opportunity to depose him on. These were some of the questions that were asked in deposition. If she says he has testimony that he doesn't know anything and I bring him up here and he says something different, I don't think it's going to help my case.

THE COURT: It might not if he's going to say it's not navigable.

MR. HOLDER: That's correct.

THE COURT: My concern is more of a procedural issue and that is when we designating an expert is, and I'll have to find the Rule, but it's, it's an important step because it put the other parties on notice of the areas of testimony that an expert would testify about so that then they know, one, do I need to depose this person. Two, what their in court testimony is going to be limited to, not what they testified in depo but what is their in court testimony going to be limited to. And, three, do I know as the opposing attorney need to go get my own expert because I need an expert witness to contra, you

know to testify opposite of what this witness testifies. It's a procedural issue. When you filed your Notice of Expert what did you indicate his testimony was going to be?

MR. HOLDER: I'd have to look. I think that's a Notice under 401 app.

THE COURT: Okay.

MR. HOLDER: Designation of Experts.

THE COURT: Counsel do you know the - -

MS. PRAWDE: I don't. I was just going to jump and say I have the expert designation ahead if I could just briefly read those two sentences?

THE COURT: Go ahead.

MS. PRAWDE: Where it says, "Testimony. The expert will testify about his report included as Exhibit 1 Holder Boundary Survey which clearly depicts designates about one-half acre of deed overlap that is the matter of the instant case." And that's all it says he'd be testifying about.

THE COURT: Okay. How do you respond Mr. Holder?

MR. HOLDER: I put the Plaintiff on notice that my position in this case was as Ms. Prawde designated the Common Law ad medium filium aquae (unintelligible) common law to streets, rivers and highways. The way Mr. Nagle interpreted the deed he explained directly related to the

use of the creek as a public highway. They were present in the deposition. So, they were on notice of what his testimony was going to be. There's no surprises here. They could have went out they had ample opportunity to go get their own expert, get a rebuttal expert. Hey, the creeks aren't the public highway. He knew he wanted to enjoin us from the creek. He knew navigability or other or everybody on notice of what the law is. They were on notice of common law I cited. They could have read the cases. They made a strategic decision not to get a rebuttal expert. I'd like to bring in the expert that I had do my research.

THE COURT: Do you understand if I let him sit in here and then I don't allow him to testify as an expert because I think you violated the rules that I'm not going to let him testify as a lay person either?

MR. HOLDER: Well, if he sits in here he can't and I don't think he has any testimony as a lay person so I'm fine with that.

THE COURT: Okay. Ms. Prawde, what did he testify in his deposition about navigability?

MS. PRAWDE: Um, he was asked, "Do you have any idea whether this particular creek would be suitable for transport?" He said, "That's not a question I can answer for you." Um, and then, "Is it your" - - "So, it's your

opinion that this is a non-title waterway?" "Yes, that is my opinion. Title waterways are actually established in law in the State of Maryland. Question. There's a whole list of them out there isn't there? Answer. Yes there is. Okay. Answer. And this does not apply to any of it."

MR. HOLDER: I would respond, Your Honor. We're talking about navigability and fact. Not navigability by law in the 1862 statute, which made all waterways in Maryland (unintelligible) Chapter 129 of the Acts of 1862 designated all water under that ebbs and flows as property of the state. And in Section 45 - -

THE COURT: What if it doesn't ebb and flow?

MR. HOLDER: No, if it ebbs - -

THE COURT: What if it does not ebb and flow?

MR. HOLDER: No, where it does ebb and flow is navigable waters.

THE COURT: Of course.

MR. HOLDER: That's in the State of Maryland.

THE COURT: Correct.

MR. HOLDER: And Section 45 of that gave those riparian owners on navigable water the same rights that were vested into riparian owners of non-navigable waters. And Professor Powell wrote a whole paper on this attretisy cited in *Lamar verse Public Work*.

THE COURT: Ms. Peeples?

MS. PEEPLES: Your Honor, I would only add that, um, because there's two differing opinions being offered by counsel here today but I'm not even sure Mr. Nagle is qualified to make an opinion as a land surveyor as to whether or not something navigable. And that would be my question.

THE COURT: That's my concern. Yeah, I hear you.

MS. PEEPLES: As so I would think that whether or not to exclude him would require voir dire. Even if you were to buy the fact that the Plaintiff were on notice, I, I just need to put that out there for the record.

THE COURT: I'm just not sure that they were even on notice. Was, Ms. Prawde, your designation of experts or Mr. Holder's designation of expert, did that come through Answers to Interrogatories or was it specifically filed?

MS. PRAWDE: It was a specific, um, separate rebuttal expert designation. Um, and I have a copy I can try to find it if Your Honor would like to see it.

THE COURT: Okay. Yes, if you do.

MR. HOLDER: I think what she's got is accurate, Ms. Prawde.

THE COURT: I'd like to see it. I guess the real question is when are we getting to Mr. Nagle if at all?

MR. HOLDER: Probably - - Well, I wanted him to hear what everybody said about the creek and so he can take the facts into consideration and give us his opinion at the end because when he was asked by Mr. Estes - -

THE COURT: I have it Ms. Prawde.

MR. HOLDER: - - he didn't have the facts.

MS. PRAWDE: Okay.

THE COURT: Say that again.

MR. HOLDER: I said when he was asked by Mr. Estes in his deposition he hadn't heard any facts so.

THE COURT: To opine as to whether something is navigable.

MR. HOLDER: Or I think as a public highway. I think it's how he - - He - - I believe that is the opinion he's going to give this Court that it's not navigability it's that the creeks were the colonial public highways before highways were built. This is how we transported. We walked through the creeks. That's the opinion I'm expecting Mr. Nagle to give. I don't think it has anything to do with navigability.

THE COURT: Okay. So, you're going to call him to come in here to tell me that the test in this case is not navigability instead there is no test because all water in the State of Maryland is the public highway?

MR. HOLDER: That's correct. And I'm going to hand

him to the legislative intent that also has that testimony in it - -

THE COURT: Okay.

MR. HOLDER: - - that he can opine about and say why this letter from the Chesapeake, I believe it's like the Chesapeake Bay watercraft foundation of, you know, why everybody can access these public waterways. It was what they stood on to convince the legislature to have this House Bill 797 that said, hey, we got to give the public access to these waterways because private owners are basically blocking all the access to the public's good and it's a problem.

THE COURT: Okay. Two questions. Where in your expert designation did you tell the Plaintiff that that's what he was going to testify as an expert?

MR. HOLDER: I, I just, just the fact that my common law said the reason that the boundaries the creek is because the creeks are the public's highways. We transport that through the *Bowie* court and through my I'll just incorporate my Trial Bench Memorandum the common law authority in that the ad - -

THE COURT: No, no, no. You're not answering my question. Where in your expert designation did you indicate that that was going to be the expert opinion he was going to give in this Court?

MR. HOLDER: Because I say this is his exhibit and this is his opinion.

THE COURT: Where? Where did you say his opinion was going to be that I should look at the legislative intent that you gave me yesterday, Exhibits 1, 2, 3, 4, I think they were for you, that I should look at those and that my conclusion should be that the legislative intent of the State of Maryland is that all waters are the public highway and therefore everybody gets to use every creek, stream, river, everywhere? Where did you say that in your designation?

MR. HOLDER: I think just that's what the designation says that this is his opinion.

THE COURT: Show me.

MR. HOLDER: Well, the report is attached as Exhibit 1, Holder Boundary Survey.

THE COURT: Okay.

MR. HOLDER: And his testimony will testify about his report included in Exhibit 1. And they had an opportunity - -

THE COURT: Where is that report?

MR. HOLDER: That is his report. The boundary survey is his report. That was, that was the only thing Mr. Nagle gave me as a report. That was his work product. Here's your boundary survey.

THE COURT: One page.

MR. HOLDER: One page.

THE COURT: That went down the middle of the stream.

MR. HOLDER: That went down the middle of the stream. And then they had an opportunity to - -

THE COURT: How do you - - How do you go from that one, this expert designation and the one page report where he showed the property line going down the middle of the stream, how do you go from that to he's going to opine that the legislative intent of the General Assembly of the State of Maryland through the years has been that all waterways are the public highway? And that therefore all property lines should be to the center line?

MR. HOLDER: I would assume because that's what I was arguing and answering in the Complaint the factual allegations I included in my Amended Answer.

THE COURT: But where did you give notice?

MR. HOLDER: In my pleadings for sure.

THE COURT: Okay, that takes a jump for an attorney to read the pleadings and understand therefore that an expert is going to come in here and go all the way to testifying that the law of the State of Maryland is in legislative intent of your Defendant's Exhibits 1, 2, 3, 4. That's a jump. Okay.

MR. HOLDER: I was a (unintelligible) attorney to do

that, no.

THE COURT: I don't think so. It takes a person who puts who does a Notification of Expert testimony correctly, clearly and fully. This is a very important document when you're trying cases as a litigator. It is. This is one of the most single most important things that a litigator can file and you've got to be exact and you've got to be - - If you're going to want to do it it's got to be in this document and I don't think that it is.

Second question I want to ask you is experts testify in order to allow the triar of fact to understand complex issues where the facts and their importance might not be clear to the finder of fact. For example, I'm not a neurosurgeon, right?

MR. HOLDER: Understand.

THE COURT: But if I had a case about neurosurgery I need to learn as much as I can about neurosurgery in order to make a decision. And that's why experts come in here. Why do I need an expert to tell me what the law of the State of Maryland is?

MR. HOLDER: Because you said there was hundreds of years going back to the King's patent and he can help you understand how the development of surveys, boundaries, interpretation of roads in his line of work is affected

by these common law decisions, how they interpret these common law decisions and their line of work in surveying and property boundaries and finding easements and finding access and things of that nature he's able to testify to that rather than me and you have to go look and read, and you know, millions, millions of cases.

THE COURT: And so, at the end of this case are you going to tell me in our Closing Argument that I should listen to Mr. Nagle with respect to how he thinks I should look at the law and I should not look at the case law from the Appellate Courts of this State that tell me how to look at the law?

MR. HOLDER: No, I think - - I don't think Mr. Nagle is the type. You saw him in 371 to even tell you the law.

THE COURT: I sure did. Nice person.

MR. HOLDER: Very nice.

THE COURT: I like him.

MR. HOLDER: I don't even think he's even going to try to tell you what your job is at all.

THE COURT: But isn't that what you're calling him as an expert to do?

MR. HOLDER: I want him to help you. I want - - I want to be able to ask him questions that help you determine what the law of this State is and how people in

his profession apply it in these situations so that you may be assisted by an expert.

THE COURT: Okay. Ms. Prawde, do you have any further argument?

MS. PRAWDE: Nothing further.

THE COURT: Ms. Peeples?

MS. PEEPLES: Nothing further.

THE COURT: Okay. If your request is for Mr. Nagle to come in here and sit so that he can then testify as an expert we can do it one of two ways. I can bring him in here and he can sit and listen and then you can put him on a witness stand and then I'm going to make a decision whether to allow him to testify or I can make my decision right now.

MR. HOLDER: You might as well make your decision right now.

THE COURT: Okay. There are two reasons I'm not going to let him testify.

MR. HOLDER: Okay.

THE COURT: The first reason is that the notification of expert designation is not, it did not list this particular type of opinion in it.

MR. HOLDER: Okay.

THE COURT: And it's a very interesting issue that you wanted to bring him to talk about. But it's not

listed. And I'm not going to allow that today.

The second reason and it's maybe the more important reason, okay, as I indicated experts come and testify to help me or a jury understand a complex issue that I might not just know. Mr. Nagle testifying as to what the legislative intent has been since the King's grant to Lord Baltimore cannot take precedent over the case law of the State of Maryland by Appellate judges. I have to follow the case law of the State of Maryland.

MR. HOLDER: Okay.

THE COURT: In, in considering the case law of the State of Maryland I'm definitely going to review your exhibit number 1, 2, 3, 4. I can determine what legislative intent is by reading it. And I don't need the help of anyone else to do that job because that's what I do.

MR. HOLDER: Very well, Your Honor.

THE COURT: Okay?

MR. HOLDER: Yes, sir.

THE COURT: Alright. Mr. Kauffman?

MR. KAUFFMAN (Bailiff): Yes, sir.

THE COURT: With Mr. Holder's consent I'm going to tell you to tell Mr. Nagle his testimony is not going to be needed today. Is that correct, Mr. Holder? You're not calling him as a lay witness?

MR. HOLDER: No, I'm not going to call him as a lay witness.

THE COURT: Very well.

MR. HOLDER: Tell him thank you very much.

THE COURT: Tell him thank you from the Court and from Mr. Holder.

MR. KAUFFMAN: Yes, sir.

THE COURT: Okay. Okay. We were in the middle of testimony with respect to Exhibit 21. Has Exhibit 21 been admitted?

CLERK: Yes.

THE COURT: Okay. We were talking about the stake at the end of L-5 on 9186 and we're facing north in that photo.

Q. I was just asking if you believed it was generally in the center section. If you divide the creek in thirds would it be in the center third of the creek?

A. No. Maybe on the, maybe on the closest line to -- It's not in the creek. Again, it's on land. It's one important distinction. Number two is the creek itself actually exists to the right of this, okay, where the water flows at this present time. And, again, no, it wouldn't be in the middle or on the middle third of where the creek is flowing and where the creek bed is, no, it's not.

Q. Is the stake on an island in the middle of the creek?

A. I don't think it's on an island. I can't tell. But it looks like there's a tiny little bit of water to the west, Your Honor, um, maybe quarter two across but it's obstructed by brush which hasn't floated away here, small walls, brush. Apparently it hadn't rained recently. But, no, that's on land. It doesn't, I can't quite tell if that's an island or it does appear as though there's a little bit of water here but whether or not it's a peninsula or island at that time I don't know.

Q. How do you know it didn't rain lately when you looked at that picture? What gave you that?

A. This picture was taken in 2021, I think in the Fall. Don't remember if it had recently rained or not.

Q. You said it didn't look like it rained. Why did you say that?

A. Well, if you have a large - - I don't know if it rained or not - - Um, but I can tell you that what I was talking about is, Your Honor, you can see some logs and brush here in this little area here and are clearly not moving downstream or floating as any sort of timber log or anything like that so. At this point in time, no, logs aren't passing through there is what I'm talking about.

Q. So, you were just saying if it did rain those logs would float downstream?

MS. PRAWDE: Objection.

A. No, I'm not saying that at all. There's a possibility that they could, yes.

THE COURT: Overruled.

Q. Okay.

A. But obviously they haven't.

Q. Okay. Thank you.

A. You're welcome.

MR. HOLDER: I believe 21 has been admitted.

Q. Alright. This is Defendant's 22, Mr. Estes. Do you know where that picture is taken?

(Defendant Holder's exhibit 22 was marked for identification.)

A. Yes. This is, Your Honor, my back would be to facing south. I'm looking north from the washed out railroad bridge towards the big pool downstream on the Little Antietam Creek.

THE COURT: Got it. Any objection to 22?

MS. PRAWDE: No objection.

THE COURT: 22 is admitted.

(Defendant Holder's exhibit 22 was admitted into

evidence.)

Q. Do you recognize this picture, Mr. Estes?

(Defendant Holder's exhibit 23 was marked for identification.)

A. Yes.

Q. Describe it?

THE COURT: Are we on Defendant's exhibit 23?

MR. HOLDER: Defense 23 please.

A. Yeah, this is, uh, this is where, Your Honor, the Spring Creek comes into the Little Antietam Creek so my back would be facing north and this is generally looking southwest, so, the washed out railroad bridge would be to the left of this picture, up hear quite a ways. And this flows downstream. But the, the Spring Creek that I call it would be flowing in here. I own on this entire area over here. And, again, you can see someone, that sign wasn't there before Mr. Holder moved in, but someone put a No Trespassing sign.

THE COURT: Okay, I've seen the sign before in other photos. Now I understand where you are.

MR. HOLDER: Ill move to admit Exhibit 23.

MS. PRAWDE: No objection.

THE COURT: 23 is admitted.

(Defendant Holder's exhibit

23 was admitted into evidence.)

Q. Hold onto this.

A. Sure.

Q. So, generally you're saying when you say you own on that side of the creek you're talking about looking over the, over the creek bank to this, what was it, fence line here on plat 9186 going from the end of L-5 the stake there north to where this line L-8 goes back in the creek? Is that generally the area we're looking at?

A. No, and if I may approach?

THE COURT: In that photograph?

A. No, no. I could show you.

THE COURT: Are you right there at the Spring Creek junction looking across?

A. Yes. Yep.

THE COURT: To the area that was previously in dispute until my Summary Judgment Order?

A. That's correct.

THE COURT: Got it.

Q. And do you see an area of green grass?

THE COURT: In the photo?

Q. Yeah, in the photo do you see an area of green grass in the photo?

A. Yes.

Q. Is that generally where this, this line from L-5 to L-7, the end of L-7 would be?

A. Well, there's, there's grass everywhere. Number one, Your Honor, this area up here has never been in contention. That's Uncle Eddie's or Deena Holder's, I think it's Deena Holder's but they call it Uncle Eddie's or maybe who Uncle Eddie's is no one really knows.

THE COURT: That's an LLC that Mr. Holder formed in Nevada, I think, or New Mexico.

A. Yes.

THE COURT: I think Uncle Eddie's is currently the owner of what you're pointing at. You're pointing at the top of the photo.

A. Yeah. In this general area. That's right, so –

THE COURT: Deena Holder I think owns the two parcels that have the houses on. The yellow house and the purple, gray house. Gray?

A. Okay.

MR. HOLDER: Gray.

A. Gray. But, at some point in time.

THE COURT: At some point in time Deena Holder owned what you're pointing at.

A. That's right. And she owned - -

THE COURT: And then it switched.

A. - - Uncle Eddie's. She was the member of Uncle

Eddie's.

THE COURT: I understand.

A. Yes.

THE COURT: The membership has been interesting.

A. We think.

Q. So, is the - - Would it be fair to say the green grass is Uncle Eddie's?

A. I'm not going to make determination looking at this picture, no. Um, there used to be, until you removed them, um, you know a fence line that ran this some here fence posts, all of this was covered with beautiful little shrubs and bushes.

THE COURT: And you're pointing to the left side of the photo in the green - -

MS. PEEPLES: Objection.

A. That's - -

Q. Mr. Estes - -

THE COURT: Hang on. Everybody - - Stop Mr. Holder. You're pointing to the left side of the photo in the green grass?

A. That's right.

THE COURT: Okay.

A. There's green grass there. That green grass wasn't there before. All of this was covered with trees, brush, shrubs, everything before - -

THE COURT: He's pointing up somewhere in the green grass Mr. Holder.

A. That's right. To the left of the No Trespassing sign which someone placed there.

Q. Okay. But the green grass is Uncle Ed - - That's where Uncle Eddie's land begins, correct?

MS. PRAWDE: Objection.

THE COURT: His testimony was - - You've asked that question now three times - -

MR. HOLDER: I - - Okay.

THE COURT: - - and his testimony has been no, he cannot say that.

Q. Okay.

THE COURT: It's very difficult to look at a photo right in with perspective and 3-D almost and then compare it to a 2-D plat and say I can show you in the photo exactly where the line is. You can tell me when you testify where you think the line is but he has already told you twice he cannot do that.

MR. HOLDER: Well, I'm more trying to establish - -

Q. Do you know generally the topology of this dispute, I'll call it the disputed area here in the northeast where from the end of L-5 out here through the end of L-8 just the general topology of that are of creek bank?

THE COURT: Pointing to the original disputed area on plat 9186, Exhibit 1.

A. Yeah, certainly not the way it was before you moved in and took down all the trees and what it is now, yeah. Yeah, sure I can tell you.

Q. Okay. So, is - -

THE COURT: But isn't there a photo of it right there in his hand?

MR. HOLDER: Yes.

THE COURT: Okay.

Q. So, so is it fair to say that the area to the east of this disputed area - -

MS. PRAWDE: Objection.

Q. Is a few feet higher - -

THE COURT: Overruled. He hadn't finished his question.

MS. PRAWDE: My apologies.

Q. That the area to the east of this disputed area is generally higher than the area to the west along the fence line?

MS. PRAWDE: Objection.

THE COURT: What's the objection?

A. I - -

MS. PRAWDE: To the word disputed on that is something that has been decided in terms of where that

boundary line is.

THE COURT: I think - - I think we're, we're calling it the disputed area, quote unquote "disputed" so that we all know when we're pointing at 9186 exactly where we're talking about. It was the original disputed area. I have made a determination that it is not in dispute anymore.

MR. HOLDER: Correct.

THE COURT: Mr. Holder may still disagree with that. That's okay.

MR. HOLDER: So, the purposes of this it's no longer in dispute.

THE COURT: Right. But for our purposes of discussing it we can call it the original disputed area.

A. Can you - -

THE COURT: So, your question was is the bank on the east side higher than the land where L - -

Q. From L-5 up to L-7 over here on the west side. Is it generally higher above sea level by two feet?

A. Than, than where?

Q. Than the area to the east of the bank.

A. East of what bank?

Q. The east of the bank that is the creek bank on the east side of the disputed area that you're looking at. It's right in front of your face on that picture

when you look that creek bank.

A. This creek bank, here, Your Honor.

Q. Yes.

THE COURT: I think what he's asking you is if I was standing in that water - -

A. Yeah.

THE COURT: - - and I was facing away from the cameras, facing east, and I decided it looks like a bank to me, I would call it a bank.

A. If you were facing east looking this way?

THE COURT: No, I'm sorry, looking west.

A. West. Okay.

THE COURT: And I walked up that brown area.

A. Yes.

THE COURT: And probably full of weeds and stuff like that, right?

A. Yeah.

THE COURT: When I got to the top of it, maybe halfway up that brown area to that first bush right in the middle of the photograph.

A. Yeah, yeah, yeah.

THE COURT: Right there.

A. Sure.

THE COURT: Is that spot right there where that bush is, is that higher or lower than if I walked twenty more

feet in and I got onto the green grass? Which one is higher the green grass or the bush?

A. The green, the green grass generally would be higher but I think the slope is, is very, very gradual there.

THE COURT: Okay.

A. That I can remember.

THE COURT: Okay.

A. But, yeah, I would say I mean it's a creek bank and I think some of the, the images that have been produced actually show elevation gain or drop. In any gain or drop is, is minimal.

THE COURT: His answer was it's a little bit higher in the green but it's minor.

Q. And is it a little bit lower along this fence line a foot, two foot maybe?

A. I don't know about that to be honest with you.

Q. Okay. That's fair. And your property along L-8 you don't clean any of this property on the I'd say on the northside of the Little Antietam Creek this small land that jumps out past L-8 - -

THE COURT: Hang on a second. We're looking at Exhibit 1, 9186, we're on line 8 labeled L-8. I think we can all agree that that is a line that goes across the creek south to north or north to south, which ever side

you're standing on. And your question is does, does he own land - - Point exactly where.

Q. Uh, here in the northeast corner of L-8 and there's another line that comes down from the vicinity map that's dashed and it has due east to meet the end of where L-8 would extend that shows some property on the north bank of the Antietam Creek on this plat 9186 appears to be in the title of Mary Jane Hutzell. Do you claim any of that land?

A. That is not part of this litigation at all whatsoever.

Q. I'm just asking you a question about – -

A. I fail to see the relevance.

THE COURT: I don't understand what you're asking. I'm still confused.

MR. HOLDER: I'm just asking if he's making a claim to any of the property on the northside of the creek, right here, designated on plat 9188 - -

THE COURT: To the west and north of line L-8.

MR. HOLDER: L-8. Yes. To the west and north of line L-8.

Q. Just yes or no.

THE COURT: Why, why does that matter in this litigation?

MR. HOLDER: Well, if I wanted to go and build a damn

there and raise the water level so I could (unintelligible) logs that would be an improvement. I could make to the creek to have navigability and I have the right to do that.

THE COURT: You think you - - You think you can build it - - Let's stop for a second. Do you really think you called DNR because he built a foot bridge?

MR. HOLDER: Um hum.

THE COURT: Do you think you can go build a damn to raise the level of water in order to create navigability in order to not have an injunction imposed on you, is that what you're asking?

MR. HOLDER: Well, I think that's what the law clearly says and I was going to get to that in my argument. I just wanted to get the facts in first so I could build a foundation to get there.

THE COURT: I can look on 9186 - - Whether, whether he owns, whether he claims land there is not part of this litigation.

MR. HOLDER: Okay.

THE COURT: Let's move on.

MR. HOLDER: Okay.

THE COURT: I can look at 9186 and 10955 to see where his property lines are.

Q. Do you need a fishing rod or any gear to

crayfish?

A. I don't know.

MS. PRAWDE: Objection.

THE COURT: Overruled.

A. I've never crayfished but I would assume no.

Q. Okay.

THE COURT: I think you just lift rocks, don't you?

A. I think you use a net sometimes, maybe; I don't know. I think you would use a net unless you want to grab them by your bare hand.

THE COURT: I used to lift rocks. That's where they are.

A. Just rocks and gravel.

THE COURT: Okay.

Q. And it's your testimony that this, this water course I believe you said it was controlled by the spring more so that rainfall. The amount of outflow from the Keedysville Spring was what you believed to be the controlling, or observed perhaps, to be the controlling factor? Is that fair?

A. That, that's not what I said. I said that this is a spring fed creek.

Q. Okay.

A. In it's levels, um, stay fairly constant throughout the year given the fact that in this area here

there's a, and I didn't say this exactly, but there's a large volume of water in this area that comes from the well at the springs. So - -

THE COURT: Is the wellhead the spring of Keedysville?

A. It is. Yes it is.

MR. HOLDER: It is.

THE COURT: Could you just point on 9186 Mr. Holder where you think it is. We'll see if Mr. Estes - - Out of curiosity I think it's fascinating.

MR. HOLDER: (Steps down to easel showing Plaintiff exhibit 1). It's pretty much right in here isn't it?

A. No, if I may, Your Honor? (Steps down to easel showing Plaintiff exhibit 1.)

THE COURT: Do you think it's on the town of Keedysville property?

A. Yes, yes.

THE COURT: Oh, okay.

A. It's right down, it's actually right, right here. This is the well head itself. It's actually enclosed it with a fence so no one can get in there.

THE COURT: So, on this, on 9186 it's labeled as Washington County Commissioners?

MR. HOLDER: It is. There was some transaction of Mt. Hebron Road that section got abandoned. You can go

through the deeds but it's quite interesting.

THE COURT: Okay. So, for some reason it's labeled as County Commissioners and it may be that they own it.

MR. HOLDER: There was a dispute. I think the town of Keedysville resolved it and said the County resolved it and they abandoned their claim of Mt. Hebron Road in this area to the Town of Keedysville. That's what I remember in the land records.

THE COURT: Okay. Okay.

A. But I do think it's important to note that the town has enclosed the entire springhead with a very large chainlike fence so that the general public can't go up in there.

THE COURT: Oh, no, I know exact - - I know exactly. Can't have people - -

A. But, yeah, it's part of the stream still according to Mr. Holder, so.

Q. Do you know when that was?

THE COURT: Well, no, it's just, the government has to protect the water sources I'm sure all over this county wherever there are springs of this nature - -

MR. HOLDER: Homeland Security.

A. Yes.

THE COURT: Except maybe the one in Clear Spring. I think you can actually walk to it in Clear Spring. You

can look at it.

MR. HOLDER: Probably have to put one up Homeland Security issue to mandate.

THE COURT: Yes. I recall that. Okay, go ahead.

Q. So, we're back to the water level you believe is mostly controlled by the outflow of the spring. Is that the most relevant factor in - - I'll get back to that. Just hang on please.

THE COURT: Did we get Exhibit 23 in? Madam Clerk, has 23 been admitted?

CLERK: Yes.

Q. Is the most relevant factor to the water level in these creeks the outflow of the spring?

A. I can't make that determination. No. What I can testify to is the water level as I have seen it for the past twelve years - -

Q. Okay.

A. - - in saying that even after a huge deluge like we had last night I could still walk across those places and you can't kayak through those places and you can't float a boat and I didn't see any major logs running down through there. And if you want to talk about whether or not a flood can cause a river to rise or fall, I mean look, you can have a deluge that floods a parking lot, right, and, and overflows into a parking lot or someone's

property and there comes a car come floating down, you can see it on TV all the time. Does that make that river navigable? Or is it just that, you know - -

THE COURT: That's the decision that I would make. So, let's ask the next question.

Q. Okay. So, is it your testimony that the level of the Antietam Creek in this area of plat 9186 in the level of the spring range ever made generally constant over the twelve years you've owned your property?

A. Yes.

Q. Did you ever send a letter to MDE in January of 2018, where you opined to MDE that you thought the creek level had significantly dropped since you moved in and you were concerned about the town's water supply?

A. Yeah. At one period. That was in Spring Creek. That was in Spring Creek which is not on my property.

THE COURT: When was the MDE letter?

Q. January of 2018, sir, is that accurate?

A. I don't know when I wrote that letter but my concern at that time was that there used to be water that came out all around the edges of the embankment at the springhead, okay. There was a pool there but there's a like a concrete embankment, which sort of creates the pool, okay. And there were boulders on either side and earth and the water it started to go around that, okay.

And, so, when I moved in, yeah, the water level may have been a bit higher, a bit lower. But, what the town did was they started and they, they went in and there's all this development, right, that's going on and there is certain withdraw limitations on, on the wellhead and I noticed what I thought that there were decreases in outflow from the spring. Okay. Because of withdrawals from the spring. Um, so, generally speaking, you know, the water level was decreasing in that area so then the town came in and they built a whole new embankment with huge, you can look it up online, they got pictures of it, that completely enclosed the, um, the, the springhead. They rebuilt portions of that concrete embankment if you want to call it that, put new stones and made it really secure. So, no. I mean my testimony is that the water levels in the Little Antietam Creek, in my creek, have remained relatively constant over time. Was there a perceivably, was there a difference in the water level? Yes. Um, up in Spring Creek as it feeds into my creek, yes. But the levels in my creek and the Little Antietam Creek in general over the last twelve years have remained constant, you know, yes, that's right. And my concern was that, if anything, the water levels had decreased a little bit due to the draw on the wellhead.

Q. And that's what you represented to Maryland

Department of Environment; do you agree with that?

A. Yeah, I asked them to come out and to make sure that my rights were protected and that the environment was protected, that we do not over, that we do not take too much water from that wellhead beyond what's permitted and allowed. That's what I asked them to do. And they sent me, you know, how much had been drawn, you know, the times of year, all that other stuff, so, yeah.

Q. Okay. And your rights to that water are based on that you own next to it or what rights were you concerned with?

MS. PRAWDE: Objection.

THE COURT: Sustained. I don't think that he has alleged that he has right to the actual water.

MR. HOLDER: Okay.

THE COURT: His testimony was that it was looked like it was decreasing so he contacted MDE so that they would be aware.

MR. HOLDER: Okay.

THE COURT: Based on - - I mean you can it concerned for the environment but I think it was more he indicated because of the construction in there it seemed like more water was being used.

MR. HOLDER: Right to the public to just have water.

THE COURT: To have water, sure.

MR. HOLDER: That's fine, that's fair.

Q. The picture, exhibit 23, can you take another look at that?

A. Yes, sir.

Q. Along the bank specifically.

A. Um hum.

Q. Do you notice an area of the bank near the waterline that looks more as exposed creek bed than bank in that area and would you say that that's maybe the decrease, a decrease in water level? Can you determine where the high watermark is on that bank?

A. Not really sure what you're asking. This is a picture of the creek that I took at this time. It's fairly representative of the way that the creek looks generally. This area here, Your Honor, um, used to have - -

THE COURT: Pointing to the main area of brown looks like leaves and brush.

A. That's right. And to the right of this going down this way my property generally runs from this Not Trespassing sign, which again, I didn't place, to the right which would be to the west, downstream on the Little Antietam Creek to that point where Mr. Holder and you were discussing where it goes across the creek.

THE COURT: Yes.

A. Okay, um, this was all covered to the right of this.

THE COURT: I understand. What he's asking is looking at that photograph - -

A. Uh huh.

THE COURT: - - does it appear in the photograph to you that the water was higher than it is in that photograph based on any evidence you can see along the bank?

A. No, no, I mean leaves - -

THE COURT: His answer is no.

MR. HOLDER: Okay.

A. Leaves along the bank and everything like that.

THE COURT: Thank you.

Q. Okay, and Mr. Estes, is the ford in the creek you said that's generally the lowest point of Spring Creek as it goes through your property to the, that's the shallowest portion - -

A. I did not say that, no. It is shallow in there but I did not say that that is the shallowest portion, no.

Q. Okay.

A. There's certainly other areas, which are shallower than that.

Q. Okay, did you, did you discuss floating down your

creek or like creeks with Judge Joe Michael on his property that he has a light creek on his property that people float down?

MS. PRAWDE: Objection.

THE COURT: What's the objection.

MS. PRAWDE: I don't know what the relevance is of whether Judge Michael's creek has, whether someone can float down that has anything to do with whether someone could float down Mr. Estes' creek.

THE COURT: What's the relevance?

MR. HOLDER: I'm not asking - - I'm just asking if he had that discussion with Mr. Michael. This is for later impeachment question. I'm just asking if he discussed it with Judge Joe Michael. It's going to have to do with whether I might even need to bring him in for a witness.

THE COURT: So, this is strictly for impeachment?

MR. HOLDER: If he's ever discussed it with him, yes.

THE COURT: Let's be clear though. Because I want the record to be clear.

MR. HOLDER: Okay.

THE COURT: I am assuming that that discussion would have occurred before Judge Michael was a judge.

MR. HOLDER: Probably so.

THE COURT: Okay. My recollection is Judge Michael has been a judge for about a year. Does that sound

right?

MR. HOLDER: I think March, yeah, I think he got appointed right there before the - -

THE COURT: Yes, so he got appointed. He immediately had to run in the primary. Okay. So, he was appointed this year, 2022.

MR. HOLDER: Yeah, it was right after, um, we had a deposition.

THE COURT: So, let's call him, my belief is what you're asking him about is probably a conversation, if it happened, that predated Judge Michael being a judge.

MR. HOLDER: So, call him Deputy State's Attorney.

THE COURT: Or Joe.

MR. HOLDER: Joe.

THE COURT: Whatever you want to call him. But if we call him Judge Michael the record would read as if the conversation occurred while Joe was a judge. And my sense is that it didn't, based on my reading of the pleadings and everything you've ever put in, that it was before Joe was a judge. Does that sound fair?

MR. HOLDER: I think.

THE COURT: Okay, why don't we call him Joe Michael.

MR. HOLDER: Okay.

Q. Did you discuss with Joe Michael the use of your creek for kayaking as compared to what he's seen on his

property the usage?

A. I'm not sure that I talked about his property. I just can't remember all of the conversations, whatever conversations I've had. My recollection is that I had taken out a temporary restraining order against you. I think Mr. Michael, who I know because I used to practice law here and I'm friends with him, I think he overheard you making wild accusations against me in court. What Mr. Michael likes - - What Mr. Holder likes to do is - -

THE COURT: Hang on. Stop.

A. Sure.

THE COURT: Stop. The question was really simple. Have you ever had a discussion with Mr. Michael beit in Mr. Michael being a landowner, somewhere in the general area or being a colleague of yours as an attorney over the years or in his role as a Deputy State's Attorney when he was Deputy State's Attorney did you ever have a conversation with Mr. Michael about the creek, your creek and floating in the creek, whether people are allowed to float? Anything like that?

A. Yes, yeah.

THE COURT: Okay, his answer is yes. He did.

Q. What did you tell Mr. Michael about it?

A. About?

Q. About people floating in the creek. What

statements did you make to Mr. Michael?

A. Mr. Michael - -

THE COURT: How is this relevant to the decision I have to make Mr. Holder? Just, help me. Proffer for me where this is going.

MR. HOLDER: Well at one point Mr. Estes told you in March 11, no, people when it was convenient for him to get the case dismissed and the wind was blowing - -

THE COURT: Which case?

MR. HOLDER: The 420 case, *Morral verse Holder*, 420 - -

THE COURT: Okay.

MR. HOLDER: The 20 people, the Declaratory Judgment (unintelligible).

THE COURT: Okay.

MR. HOLDER: When it's convenient in his Motion to Dismiss and the wind was blowing this way and she said oh no, Your Honor, they can float down the Little Antietam Creek. They can float down it. They can kayak down it. And I believe he's made statements to other people that –

THE COURT: I think he's still saying - - I - -

MR. HOLDER: - - say you can kayak down that you can actually do it. And he's in here saying no you can't today.

THE COURT: I'm not sure that that's what he's

saying.

MR. HOLDER: He's saying it's not physically possible is what he's telling you.

THE COURT: There's a difference between floating and kayaking and the transport of commerce for navigability determination. What he's saying is it's low enough generally, he has twelve years of experience, that kayaking, canoeing would be hard. And if that's hard to do then there's no way you're taking a motorboat through there, which some of the cases suggest, is what we should be looking for for navigability. I know you want me to look for floating of logs, okay. I'm going to look at those cases too. And his testimony is that floating logs would be kind of hard too. Okay. But I don't know that he is sitting in this courtroom as the Plaintiff saying that he wants an injunction to stop the public or you from rafting or kayaking. You just can't walk through the creek. So, do you want to ask him that question?

MR. HOLDER: No, I'm good.

THE COURT: Are you sure?

MR. HOLDER: Yeah, I'm sure.

THE COURT: No, no, no, because maybe it solves this Joe Michael issue for you. You want Joe to come in here and tell me that once upon a time Ben Estes said to Joe I don't care if people kayak. To impeach him for now

saying he doesn't want anybody to kayak, right, that's the impeachment?

MR. HOLDER: Well, just saying he didn't kayak down there. I think, I think his testimony today is not reflected of his testimony and his statements of other people such as MDE, Christine Morral, Joe Michael, over the course of this litigation especially when him and Christine Morral were already discussing a float and jam, a party I was having and how they were going to float around they were concerned that they could do it and it could happen. So, now, we're concerned that he's saying it could never happen and it's sort of night and day difference.

THE COURT: Mr. Estes?

A. Yes, sir.

THE COURT: Is it your position in this litigation that he public does not have the right to float on top of the water?

A. No.

MR. HOLDER: But he's offering testimony that they can't do it physically.

THE COURT: To, so that his attorney at the end of the case can stand up in closing and say Judge Wilkinson of course it can't be used for commercial purposes if you can barely even kayak. Do you understand what I mean?

MR. HOLDER: I do.

THE COURT: Okay, so he has just answered the question that it is not his position, he is not taking the position that the public cannot float. Does that solve your Joe Michael impeachment idea?

MR. HOLDER: It does. I won't, I won't (inaudible).

THE COURT: Okay. I just want to be sure that we're on the same page because I think you, you might be thinking what he's asking the Court to do incorrectly. You might be thinking about it incorrectly.

MR. HOLDER: Okay.

THE COURT: My understanding is he is asking the Court to enjoin you from walking in the creek.

MR. HOLDER: Okay.

THE COURT: Because the public can't do it either.

MR. HOLDER: Okay.

THE COURT: Alright. That's the issue of navigability. And the issue of your idea of Exhibit 1 through 4, Defendant exhibits, what is the public highway, right?

MR. HOLDER: Right.

THE COURT: What is the public highway.

MR. HOLDER: Right.

THE COURT: Okay.

MR. HOLDER: Okay, good enough.

THE COURT: Do you understand now that he's not asking me to enjoin anyone from floating on top of the water?

MR. HOLDER: Okay.

THE COURT: Not even you.

MR. HOLDER: Okay.

THE COURT: Is that correct, Mr. Estes?

A. That's correct.

THE COURT: Okay.

Q. Okay. May is see my Exhibit 8 please?

THE COURT: Do you have Exhibit 8, sir?

A. I do not have.

THE COURT: Okay. 23 is admitted if it has not already been admitted.

MR. HOLDER: (Inaudible)

THE COURT: Let me see 8. Okay. How much longer because we're going to need to take a break?

MR. HOLDER: Twenty minutes.

THE COURT: We need to take a break. Let's take a break before we get into number 8.

MR. HOLDER: Okay.

THE COURT: Okay. You're still under oath. You may step down to do what you need but don't speak with your attorney about any of the evidence or any of your testimony or anybody else. We will take five minutes

folks.

(Whereupon at 11:00 a.m. court was in recess and resumed at 11:10 a.m., and the following occurred in open court:)

THE COURT: Okay, we're back on the record. Mr. Estes is on the stand, you're still under oath, sir. Mr. Holder.

Q. I'm handing you back Defendant's exhibit 8, it's your Affidavit.

THE COURT: Make sure you move towards the microphone.

Q. It's your Affidavit.

A. Yes, sir.

Q. Paragraph 20.

A. Yes, sir.

Q. Do you see reference to disputed property in that Affidavit?

A. I'll read it to the Court.

THE COURT: What was the date of this Affidavit?

MR. HOLDER: May 12, 2021.

THE COURT: And it was filed in this case?

MR. HOLDER: In this case.

THE COURT: Okay.

A. Marked as Defendant's exhibit 8. It says if the Court will indulge me for a moment, "From at least 1993

through 2018 a period of 25 years Plaintiff and his predecessors satisfied the elements of adverse possession with respect to disputed property." Then it goes on "Visibly and adversely possessed the disputed property and maintaining paying taxes on the same and generally using or occupying the disputed property in a normal manner that's similarly, similar property is used by a landowner."

Q. Okay, and did you define the disputed property earlier on in that Affidavit as being under black diagonal lines maybe at number 6?

A. Number 6 is not here. Would you like to point it out to me, sir?

Q. Yeah, I can. I'm sorry, number 11.

THE COURT: You want him to read number 11?

MR. HOLDER: Just I'll just ask if he just define it.

A. It says, "For the sake of clarity the Estes property has shown with black diagonal lines on Exhibit 4. The Holder property is shown with blue diagonal lines sometimes over black diagonal lines going the opposite direction. In the portion of the Estes property primarily in dispute the disputed property is highlighted with yellow highlighter."

Q. Okay. And the disputed property that was highlighted with yellow property would that be what we're

calling the original disputed property, is that what you highlighted in yellow?

A. I don't have - -

THE COURT: On exhibit 1, which is plat 9186.

A. I do not know because I don't know what was attached to this. And I don't mean to be, to be problematic, I just don't have what was filed with this.

THE COURT: You don't have exhibit 4 in front of you?

Q. Do, do you remember when you filed that Affidavit what you believed to be the disputed property?

MS. PRAWDE: Objection.

A. For the record, sir, I don't believe any of my property is in dispute. I've always maintained that it is my property in its entirety.

Q. I'm not asking about - -

THE COURT: I think, I think. I understand. I think where he's going is was the yellow of Exhibit 4 that would have been attached to the Affidavit the same as what we're pointing to on 9186. Are you asking him is it exactly the same or just generally the same?

Q. Is it, is it generally the area - - When you were in that Affidavit were you just generally talking in paragraph 20 about the area to the west of the Little Antietam Creek?

A. The area that's the subject of this litigation, I

mean, I could sit here and study this forever. But, look, if I may approach, Your Honor, the map?

THE COURT: Sure. Keep your voice up, okay.

A. (Steps down to well of court to look at Plaintiff exhibit 1) Sure. I have always maintained that I own in the area in question from, this is just part of it, from L-12 to L-10, iron pin set to L-9 to L-8 to L-7 to L-6 to L-5.

THE COURT: Right, all the way down, all the way down to the bridge.

A. All the way down. That's correct.

THE COURT: And the disputed area, quote unquote - -

A. Quote unquote.

THE COURT: - - was sort of that west on the west side of the creek - -

A. Yes.

THE COURT: - - from the bridge up to where your property line crosses the Antietam Creek at the northern most part.

A. That's correct.

THE COURT: Okay.

A. And all the way up Spring Creek you we discussed. That's correct.

THE COURT: Right.

Q. Alright, and my question about number 20 - -

THE COURT: Let him have his seat. (Mr. Estes returns to witness stand.)

Q. What personal knowledge did you have or records or testimony of you maintaining any of that disputed property? What have you done to maintain it?

A. If you're asking - -

THE COURT: Hang - - I've already decided where the property line was. Where is this going? Is this strictly impeachment?

MR. HOLDER: Yeah, just that he put on his Affidavit - -

THE COURT: Like it was yesterday?

MR. HOLDER: Yes. Correct.

THE COURT: Okay.

A. Look, you know, if we're talking about adverse possession. There are land records from the Hopes - -

Q. I'm not talking about that.

A. No, no, if I may answer, Your Honor.

Q. I'm just talking about maintenance. Just - -

THE COURT: Hang on. Gentlemen, gentlemen, stop.

A. Thank you. And I apologize.

THE COURT: This is not an argument. You asked a question. What personal knowledge does Ben Estes have of his ownership, maintenance - -

MR. HOLDER: And the Hopes.

THE COURT: And the Hopes from 1993 to the present.

MR. HOLDER: To the present.

THE COURT: For the west side of Little Antietam Creek.

A. To satisfy the elements of adverse possession in this Affidavit. Well, there are land records in Washington County that the Hopes filed, I believe their predecessors filed, you signed, your wife signed that show the property line exactly where this is or very close. So, what knowledge do I have that either, that either own that property by absolute right of title or by adverse possession, the Hopes, their predecessors and you yourself, Uncle Eddies and Mrs. Holder have all filed records in the Land Records of Washington County where you signed a survey, saying yep, I don't own this, Uncle Eddie's doesn't own this and Deena Holder doesn't own this. And if that's not enough notice to satisfy the requirements of evidence of adverse possession, and did I look at those at my closing, yes. Have I looked at them numerous times during the course of this litigation? Yes. I don't know what more you want me to say. Have I walked there for, for 12 years, yes? Have I been on both sides of the creek? Yes. Have I placed property markers on that side of the creek? Yes. Have I hired a surveyor to come out and show me where those survey markers are?

Yes. Or where my property line is? Yes. Have I seen areas where you yourself and your surveyors placed property markers? Yes. I have pictures of them there. Yes. So, what knowledge do I have, what more knowledge do I need other than your signature, your wife's signature, Uncle Eddie's signature and deeds in the Land Records of Washington County saying that you don't own it. I don't know what else I can give you, sir.

MR. HOLDER: So, you have no evidence of maintenance? You don't have any personal knowledge of maintenance?

MS. PRAWDE: Objection.

A. I have personal knowledge of maintenance.

THE COURT: Overruled.

A. Of course I do.

Q. Okay, what is it?

A. I just told you I walked there for 12 years. What more knowledge do I need than that?

Q. Okay, did you tell me in Interrogatories and in other pleadings that that property is never been touched by the hands of a human in the nine years you've owned it?

A. I hadn't touched it, no. I had not touched it and I don't know that anyone else had touched it. I also said that, yeah, there was markings from a beaver at the creek. I've got pictures of a beaver swimming but that's

not a human. But I certainly didn't cut any trees over there, no.

Q. How can you walk there without touching it?

A. I don't understand what you're talking about.

Q. How can you walk on the property without touching the property? Without touching the land. How can you walk somewhere without touching the land?

A. I - - When you walk, you walk on - - I can't walk on water, Your Honor, or Mr. Holder. I cannot walk on water but I walked through the water on the, on the bed of the creek to get to my land. I hopped over rocks to get there.

THE COURT: I think we're having a little bit of a word battle by what did he mean that the area had not been touched by human hands. We're going down a - -

MR. HOLDER: Okay.

THE COURT: I think what he's acknowledging is he didn't go on the west side during his ownership and start cutting down trees.

A. That's correct. But I did go there, Your Honor.

THE COURT: Yes. So, you touched the land you just didn't touch it with your hands to change the land.

A. That's right. And I did not - -

THE COURT: Mr. Holder, I just don't want to waste time on a very minor detail.

MR. HOLDER: I understand.

Q. And what, what personal knowledge do you have that the Hopes maintained it or walked there? Did you ever see Mr. Hope?

A. No, but I witnessed what was there and when I purchased the property Mr. Hope, who is now deceased, walked the area of the property with me, we didn't cross the creek at that time but he very explicitly told me we owned - -

MR. HOLDER: Objection. Statements that further the declaration of a dead person to further his interest are not admissible.

THE COURT: I'll sustain the objection. Sounds like hearsay. But he walked - - You say that you walked the land with Mr. Hope?

A. I did, yes.

Q. The land on the east side?

A. Yes.

Q. Okay. Thank you. And then, do you still have your Affidavit there?

THE COURT: Number 8?

Q. Yes, number 8. The very last paragraph again, you said you asked me to show you some evidence of my ownership for Uncle Eddie's ownership and I showed you nothing, is that generally what you - -

A. What paragraph?

THE COURT: Why don't we read the paragraph?

Q. Okay.

THE COURT: Which paragraph do you want him to read?

Q. Paragraph - - What's the last one, 21?

A. Yeah.

Q. Okay. Do you have 21 please?

THE COURT: Do you want him to read 21?

MR. HOLDER: Yes, yes.

A. Sure.

THE COURT: Read 21 Mr. Estes.

A. "While I have requested that Mr. Holder provide me with some proof that he has a valid claim to part of my property Mr. Holder thus far has not presented any evidence to refute Mr. Frederick's opinion or to raise a dispute to the fact that Mr. Frederick's plats follow the courses and distances contained in the Holder and Estes chains of title."

THE COURT: What's the date of the Affidavit again?

A. 5/12/21.

THE COURT: Thank you.

Q. Do you know when you filed your First Amended Complaint in this? Would it have been in March?

A. I don't remember.

THE COURT: March of what year?

MR. HOLDER: March of 2021.

A. March of 2021. If that's what the court record is, yeah, sounds about right.

Q. Okay, and was that verified under oath that complaint?

A. Uh, I don't know. If it says it was it was.

THE COURT: Look to the last page, that's usually where it is.

A. I don't have the last page.

Q. It's the second to the last page was the comparison copy so I have to dig out the, uh (unintelligible).

THE COURT: No, when was it March of '21?

MR. HOLDER: March of '21.

THE COURT: Madam Clerk, can you print out the Amended Complaint dated approximately March of '21?

MR. HOLDER: I think it's March 6th.

THE COURT: Are you going to be asking particular paragraphs?

A. I mean, I - -

MR. HOLDER: Just about paragraph, I believe - -

THE COURT: Okay. Let's wait until we get the actual copy. I don't want to be looking at a comparison.

MR. HOLDER: Okay.

A. If I remember - - If I remember correctly,

complaints to quiet title had to be under affidavit.

THE COURT: Hang on a second. What number is that? Do you just want to change the sticker, Madam Clerk? Or do you want to go to 25?

CLERK: 25.

THE COURT: Okay, so Defendant's exhibit number 24 is not admitted. That's just a comparison copy of an Amended Complaint. Not admitted.

(Defendant Holder's exhibit 24 is not admitted into evidence.)

THE COURT: We will get to 25 once it's printed out. Plaintiff's Amended Complaint is marked as Defendant's exhibit 25. Do you wish to show it to the witness?

(Defendant Holder's exhibit 25 was marked for identification and admitted into evidence.)

MR. HOLDER: Yes.

Q. Mr. Estes, this is Defendant's exhibit 25. Is that a copy of your first Amended Complaint in this lawsuit?

A. Yes.

Q. And did you sign the verification?

A. Yes.

Q. Could you flip to paragraph 19?
A. Paragraph 19?
Q. Yes.
A. Okay.
Q. Could you refresh yourself with number 19?
A. It says, "However the claims of title for both properties including plats of both properties prepared by a license surveyor Frederick Seibert and Associates separately on behalf of the parties clearly showed that the boundary line between the parties is on the western side of Little Antietam Creek."
MR. HOLDER: May I see the exhibit please?
THE COURT: It might have been the wrong paragraph.
A. Are you sure you don't want me to read that one again?
THE COURT: Let's just answer the questions.
A. Yes, sir.
Q. Paragraph number 20, I apologize.
THE COURT: 20?
MR. HOLDER: Yes.
THE COURT: Okay, so we're going to paragraph 20 of Plaintiff's Amended Complaint.
A. Sure. "FSA acknowledged that its initial plat of the Holder property contained a minor error in locating the eastern boundary of the Holder property. It also

acknowledged that even if the initial plat or the Holder property was correct the shared boundary line would still be on the western side of the Little Antietam Creek." 4

Q. And you filed that verified complaint prior to the Affidavit in Exhibit number 8?

A. Is there a filing date on it?

THE COURT: I think it's March of '21.

A. March '21. Yes.

THE COURT: You agree that March of '21 is before May of '21?

A. Yes, yes.

Q. What evidence did you have personal knowledge that there was a mistake by FSA?

A. I don't think there is a mistake.

Q. In that Complaint you alleged under oath that there was a mistake and I want to know what evidence you had.

MS. PRAWDE: Objection.

THE COURT: Let's read it again. FSA acknowledged maybe it made a mistake. Read your words again. Paragraph 20.

A. 20. "While FSA acknowledged that its initial plat of the Holder property contained a minor error in locating the eastern boundary of the Holder property. It also acknowledged that even if the initial plat of the

Holder property was correct the shared boundary line would still be on the western side of Little Antietam Creek.

Q. Okay, so what information did you have that FSA acknowledged a mistake?

MS. PRAWDE: Objection.

THE COURT: What's the relevance at this point Mr. Holder?

MR. HOLDER: He said, read number 20.

THE COURT: I got it. I know what it says.

MR. HOLDER: Okay. So - -

THE COURT: Is this impeachment?

MR. HOLDER: This is impeachment that he is willing to just litigate how the wind blows, write an Affidavit and swear to it to get by whatever procedural hurdle he needs to get by to get whatever evidence in. His testimony is so inconsistent. This Court cannot - - It's not believable. He says what he wants to say all the time.

THE COURT: Well, hang on, hang on. What you're comparing is his Affidavit of May of 2021 with the Amended Complaint of March of '21. So, March complaint would have predated the May Affidavit.

MR. HOLDER: That's correct.

THE COURT: And what you're concerned about is

paragraph 21 in the Affidavit which indicates that Holder has not provided me evidence of his ownership of the disputed area. That's what he wrote in paragraph 21 of the Affidavit.

MR. HOLDER: Some evidence.

THE COURT: Say that again.

MR. HOLDER: I haven't provided him - - He's asking to provide him any evidence and I have not even been able to provide him some evidence.

THE COURT: Right. And then in his Complaint still complaining that he owns what he believes he owns pre-dating that Affidavit he said that FSA acknowledged maybe that a minor mistake of the property line was always on the west side.

MR. HOLDER: Okay.

THE COURT: Okay. And you want me to determine that that impeaches him.

MR. HOLDER: Along with the other characteristics of his testimony such as the personal knowledge he swore to when he said he's only ever been to the railroad bridge and looked over it one time in his life; that he's never on the west side of the creek with the Hopes. He never saw the Hopes on the west side of the creek. And personal knowledge in an Affidavit to defeat summary judgment is like that is what you have to have. So, he's

willing to put whatever he needs to in his affidavits and then I have to try and come in here, put him on the stand for hours and dissect this web he weaves of these untruths that maybe you can wiggle out of with a word or two and maybe you can say ahh but if you know the standard in our state it's *Pittman verse Mid Atlantic Realty* and he testifies there was only two people living in the house and I think later he said there was more than three people living in the house and I think later he said there was more than three people living in the house and they said that affidavit is a sham. We're striking it. You can't go in and testify one way.

THE COURT: But we're in court now. So, I'm not striking affidavits because those are previous pleadings. We're in Court for testimony now. I understand your point.

MR. HOLDER: Okay.

THE COURT: That you believe he has filed false affidavits. I have written all of the indications where you believe there's been false affidavits and I understand that what you're going to ask me in closing argument is if you find Judge that he filed false affidavits then you got to be careful about believing him today in his witness testimony.

MR. HOLDER: Good enough.

THE COURT: That he's just not a believable person.
MR. HOLDER: Yes.
THE COURT: Right.
MR. HOLDER: Good enough.
THE COURT: Okay.
MR. HOLDER: Two more quick questions.
THE COURT: I fully understand your argument.
Q. Did I give you on March 4th a title report from Jack Steich in an email that said he believed the properties never crossed the creek?
THE COURT: March 4 of 2021?
MR. HOLDER: March 4 of 2020?
THE COURT: 2020?
MR. HOLDER: Yes.
Q. If we can - -
THE COURT: Do you recall that sir?
A. I remember you giving me a title report I believe from Jack Steich. I don't think he wrote in that and I may be incorrect that his opinion was that they never crossed the creek. I think that was your opinion. Second of all, to my recollection you don't own anything in this area. It's Uncle Eddie's who owns it and Deena Holder but Justin Holder does not own any property in this area, um, in this disputed area at all. And, so, you still as far as I'm concerned have not shown me

clearly I think the Court agrees that I own this property anything that would suggest that I don't own this property I still haven't seen it. And I don't think the Court has either because they've already determined the property line in my favor. Moreover, Frederick Seibert and Associates you complain to - -

THE COURT: Hang on. You're going way beyond the question.

A. Okay.

THE COURT: Just wait for the next question.

A. Well, he - - Sure.

Q. I'm going to put an email in front of you. Is that the email - -

THE COURT: What is that marked?

(Defendant Holder's exhibit 26 was marked for identification.)

MR. HOLDER: That's marked as Defendant's exhibit 26.

THE COURT: Okay.

Q. And that's an email from Jack Steich. Is that the email that I sent you with the title report?

A. I do not know because it doesn't say on here to Ben Estes. It says Jack Steich to Justin Holder.

Q. What's the date, sir?

A. The date is July 11, 2022.

THE COURT: I think you probably want him to look somewhere else for the date, right?

A. March 4, 2020. Jack Steich to Adam Greivell but not to me, so. I don't know what this is.

Q. Um, so, in the way that actually writes so I don't have to get Mr. Steich in here to testify to all the emails we sent Mr. Greivell do you believe it's possible I sent that email to you on March 4th with the title report?

A. I don't know. Mr. Holder, you sent so much stuff to me. I don't know.

Q. Okay.

A. You may have. You know, you may have. But, um, Jack Steich never told me this. I don't know. Could you have sent this to me? Maybe. Don't know. I actually have your email blocked now Mr. Holder because you've sent me too much stuff.

THE COURT: Okay, next question.

MR. HOLDER: Would you stipulate to admission of this or do I have to bring a witness?

MS. PRAWDE: I'm not going to stipulate to that. Mr. Estes is not included on the email at all. There is no evidence that he received it. He just testified he has no idea if he's seen it or not or if it was ever sent to him.

MR. HOLDER: He testified he received at title report from Jack Steich but he wasn't sure what the message said.

MS. PRAWDE: I'm not going to testify to an email between your counsel and Mr. Steich.

MR. HOLDER: Okay. Alright.

THE COURT: Exhibit 26 is not admitted at this time.

MR. HOLDER: Mr. Estes, I have concluded my examination. I appreciate your time sir.

END OF CROSS EXAMINATION

THE COURT: Okay. Make sure we have all the exhibits to the clerk. Stay there Mr. Estes.

A. Yes.

THE COURT: She will take care of that.

A. And I apologize to the Court if I have been animated.

THE COURT: No apologies needed. Ms. Prawde, you you have redirect you wish to conduct?

MS. PRAWDE: Uh, yes, Your Honor. Just two or three questions.

THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MS. PRAWDE:

MS. PRAWDE: I would like to show Mr. Estes a video. I just have it pulled off on my laptop and then a copy of

a disc for the record. Is it okay if I approach with my laptop and if counsel or Mr. Holder needs to approach rather than - -

THE COURT: Sure. Do you have the disc?

MS. PRAWDE: I do have the disc. If that's easier to just to pull up.

THE COURT: Why don't we explain what this video is.

MS. PRAWDE: Um, this is a video that was produced by Mr. Holder in discovery of him walking in the creek. Just a proffer I tend to ask Mr. Estes about the location and if he can identify the condition and the water depth.

MR. HOLDER: I have no objection, Your Honor.

THE COURT: No objection. Okay, why don't we have the disc marked and provided to the Clerk. Plaintiff's exhibit number 15 is going to be the video disc.

(Plaintiff's exhibit 15 was marked for identification.)

MS. PRAWDE: And is it easier to just pull it up here or - -

THE COURT: I think you're probably going to - - Can you get it up on the big screen? Okay, can you help assist? Mr. Estes, what I may have you do if we can get it up there on the big screen I might have you just stand down there underneath.

A. Sure.

THE COURT: I think it will be there. Mr. Kauffman?

MR. KAUFFMAN: (Bailiff) Yes sir.

THE COURT: Could you bring that easel right here in front of me so that it's not in people's way looking at the two tv's?

MR. KAUFFMAN: Yes, sir.

THE COURT: I don't mind it being right in front of me. That's good. Ms. Vanderau, do we need to turn on that TV or can we just do it on this big one? Whatever one you are on. How about if we do it on the big one. Is that okay? Mr. Estes, if you would just come stand right here in case there are any questions. And I want to understand this. This was a video that Mr. Holder produced in discovery. It's my understanding this is a video of Mr. Holder. What is the approximate date do you know Mr. Estes?

A. 2020, February 2020.

THE COURT: You think February of 2020. Okay.

A. Maybe in March 2020.

THE COURT: Ms. Prawde, how do you wish to proceed?

MS. PRAWDE: If I may play the video, Your Honor, and then ask Mr. Estes a few questions.

THE COURT: Is there, is there audio?

MS. PRAWDE: Uh, there is.

THE COURT: Okay.

(Whereupon Plaintiff's exhibit 15 (with audio) was being played in open court:)

"MR. HOLDER: And as you can see I am in a stream usually navigable by a canoe or kayak. And I'm just taking a walk here wonder what it is that's got ole Ben so worried about his privacy. Town water as you see. Nice clean water all on Ben's property here that he thinks is all his. Yet, what do we have here Ben? Oh, is that black well pipe there on your side of the creek that we're doing. Is that an attempt to illegally" - -

THE COURT: Can we pause? Okay. (Video paused.) Can you tell which direction the camera is facing right now?

A. This is facing north.

THE COURT: Okay.

A. These are trees and these, um, that's my little bridge which was reported to the MDE.

THE COURT: Okay.

A. He's in the Spring Creek.

THE COURT: So, he's right at the Spring Creek, Antietam Creek junction?

A. No, he's up into the Spring Creek.

THE COURT: Oh, okay.

A. Well up into the Spring Creek at least fifty feet.

THE COURT: Okay. And so, to the left, if I got up on that bank left and just kept walking I go to your home?

A. Uh, that's correct.

THE COURT: Okay, I understand where we are. Go ahead Ms. Prawde. (Video resumes)

"MR. HOLDER: Are you (unintelligible) for water against MDE regulations? Could be, hum. And what do we have here Ben? Oh, it appears somebody is building illegal bridge across the creek against MDE regulations. Maybe we should have the Maryland Department of the Environment come down here" - - (Video stops)

THE COURT: Is that the footbridge?

A. That's my bridge.

THE COURT: I understand.

A. It's still there after the flood last night.

(Video resumes)

"MR. HOLDER: We can properly examine this whole entire area and make sure that everybody is compliant to the Environmental Regulations because unbeknownst to the public I've been made fully aware of the (unintelligible). Value of

the public per se air quality, water quality. So, we're going to continue to take a stroll here." (Video stops)

A. This is you can tell he had been walking down the stream so he now he's been walking down stream the Little Antietam, I mean the Little Spring Creek is here, which he's still standing in. This is the Little Antietam Creek the railroad bridge upstream or to the south.

THE COURT: To the left.

A. Is to the left, that's correct.

THE COURT: And then the big bend is going to be to the right.

A. This is the area where (inaudible) both sides.

THE COURT: Understood.

A. That's correct. Should I explain as things - -

THE COURT: I think Ms. Prawde wants to get it playing again.

A. Okay.

MS. PRAWDE: Uh, yes. For some reason it's stopped playing.

THE COURT: Totally stuck on pause. There you go.

(Video resumes)

"MR. HOLDER: On a (unintelligible)." (Video stops, technical difficulties.)

THE COURT: Why don't you pull it back a little bit.

Maybe go back fifteen seconds and see if it will let you hit play.

MS. PRAWDE: Okay.

(Video resumes)

"MR. HOLDER: So, we're going to continue to take a stroll here on a regular basis and just make sure that - -" (video stops technical difficulties)

(Video resumes)

"MR. HOLDER: Everybody - -" (video stops technical difficulties)

(Video resumes)

"MR. HOLDER: On a regular basis and just make sure that everybody in the stream bed - -" (video stops technical difficulties)

(Video resumes)

"MR. HOLDER: On a regular basis and just make sure that everybody in this stream bed is complying with the - -" (video stops technical difficulties)

MS. PRAWDE: My apologies, Your Honor.

THE COURT: That's okay.

MS. PRAWDE: I don't know why it's - -

THE COURT: I don't know why either. Do you have it playing in two different places?

MS. PRAWDE: Yea, I pulled it up just to see if there are any issues that came up. I've had no issue playing the full video before though. But maybe I can close out of one and then I'll - -

THE COURT: Maybe that's the problem.

MS. PRAWDE: Is there any way I can play a CD or no?

THE COURT: You have what Dawn?

MS. VANDERAU: It's the internet connection if she plays it from the CD (inaudible).

THE COURT: Do we have a CD player here though?

MS. VANDERAU: You should have one on your laptop, yes.

MS. PRAWDE: I don't believe I do.

THE COURT: Do you have a CD?

MS. VANDERAU: I have on upstairs.

THE COURT: Do you think it's the internet service?

MS. VANDERAU: Yes.

THE COURT: Okay.

MS. PEEPLES: I have a hotspot over here.

MS. PRAWDE: If you don't mind maybe that would help. I apologize again Your Honor for the - -

THE COURT: I don't think your hotspot is going to work too hot either. We'll try.

MS. PEEPLES: We'll try it.

THE COURT: This building. Amazing.

MS. PEEPLES: I know that I can get you - -
THE COURT: If this doesn't work we'll try and get a player from upstairs and we'll do it later.
MS. PEEPLES: I don't know if the lock is the password.
THE COURT: Okay.
MS. PRAWDE: Is it Verizon?
MS. PEEPLES: Yep.
MS. PRAWDE: Okay. That was the bottom one?
MS. PEEPLES: Yea, the bottom number.
THE COURT: Or we can just play it on the computer and we can all gather around.
MS. PEEPLES: I've seen it, Your Honor.
THE COURT: Okay.
MS. PRAWDE: Okay, it says I'm connected to the hotspot but - -
THE COURT: You may need to close out and start again.
MS. PRAWDE: Okay. It's okay.
THE COURT: Can you just play it on your computer for me?
MS. PRAWDE: Yes, I can try that. I think - -
THE COURT: Why don't we do that? Just bring your computer right up here. Mr. Kauffman, let's get rid of this.

MR. KAUFFMAN: Yes, sir.

THE COURT: Mr. Holder, you've seen this video before?

MR. HOLDER: I've seen it a million times, Your Honor.

THE COURT: Ms. Peeples, you've seen the video before?

MS. PEEPLES: I've seen it, Your Honor.

THE COURT: Ms. Prawde, I assume you've seen it?

MS. PRAWDE: I have, Your Honor.

THE COURT: Do you all mind if I have it just sitting right here on the bench and I watch it without you actually being able to see it?

MR. HOLDER: Not at all, Your Honor.

MS. PEEPLES: No objection.

THE COURT: Very good. (Video being played on laptop at the bench) So, it's about three and a half minutes long?

MR. HOLDER: Yea, 3:44 I think.

MS. PRAWDE: 3:44.

THE COURT: Got it. That's what I'm looking at.

(Video plays)

"MR. HOLDER: So worried about his privacy. Town water as you see nice clean water all on Ben's property here that he thinks is all his.

Yet, what do we have here Ben? Oh, is that black well pipe there on your side of the creek that we're doing. Oh, is that an attempt to illegally tap the streambed for water against MDE regulations? Could be, hum. What do we have here Ben? It appears somebody is building illegal bridge across the creek against MDE regulations. Maybe we should have the Maryland Department of the Environment come down here so that we can properly examine this whole entire area and make sure that everybody is conforming to the environmental regulations. Because unbeknownst to the public I've been made fully aware of the value of the public good *per se* air quality, water quality. So, we're going to continue to take a stroll here on a regular basis just make sure that everybody in this stream bed is complying with the environmental laws that are available to us. As you see we're walking back across to the creek bank here access (unintelligible). Our side. It is deep. Is it a fairly significant channel to cross here but it's what you got to do for the public safety? Walk on around here to the, uh, (unintelligible). Once again we're looking back

at the stream there on Mt. Hebron Road and then we go to the town spring down in Keedysville. Traveling up here to where the tree leans over to that rock breakup right there that's actually where Fred Frederick at one point had established a property line. However, that property line is in contention. Because our predecessors were granted the grounds contained within the Antietam Creek bed. And aeration does deposit soil on a creek bank especially when it's a creek bank of a spring that flow has been restricted over forty years because the town has gotten bigger and it's drawing more water. You just try to be a good neighbor you know. Keep stuff nice. Keep people's property nice for them. Up here a nice set of steps. Nice clean brush. Oh, we keep the other side like that. But somebody doesn't want their neighbor to keep their side like that. Have a nice day and stay tuned for more instructional videos. So, what I've done here is I've put on a pair of hip waders and as you can see I'm in a stream easily navigable by a canoe or kayak. So, just taking a walk here wondering what it is that's got ole Ben so worried about his privacy.

The town water as you see. Nice clean water all on Ben's property here that he thinks that's all his." (Video ends)

THE COURT: Okay. That just replayed, right?

MR. HOLDER: Um hum.

THE COURT: Okay, Mr. Holder.

MS. PRAWDE: Thank you Mr. Holder.

MR. HOLDER: Yes, Your Honor. No problem.

MR. PRAWDE: Mr. Estes, you can take a seat. I just have three or four questions about that and that would be it.

REDIRECT EXAMINATION

BY MS. PRAWDE:

Q. Did Mr. Holder, did he report that foot bridge to MDE?

A. Yes.

Q. Did MDE require you to remove it?

A. Get a permit? Um, I did get a permit and I'm not sure that they required me to get it permitted. They came out an individual named Peter Resh they had two inspectors come out, Your Honor. The first one said we don't care about that at all. Um, I've got it lashed off to a tree and occasionally it will sort of wash out and then I'll go out the next day and put it in. But that's only occasionally. Like I said, it's still there from

last night and yesterday. So, they did come out and it is permitted now, whether or not they truly required me to get it permitted that's another question. But I did include it because I wanted to put a fence there too.

Q. And the channel that Mr. Holder references that he's walking in in part of the video, do you know or can you identify where that is?

A. Yeah, that's the area - - If I can approach this map, Your Honor?

THE COURT: Go ahead.

A. (Steps down to easel in well of the court) It's the deeper channel where he's walking across is this sort of big pool. It's been a while since I've seen the video. But it's this, this pool here where the Spring Creek flows into the Little Antietam Creek (unintelligible).

Q. And is that the deepest part of Spring Creek?

A. Um, that's actually not in Spring Creek. Where Mr. Holder is showing in the video is well up in here, in this Spring Creek near where my foot bridge is here. The foot bridge is still there in the same location. The black water pipe is still in same location and they're both well up in this spring creek. My testimony, and you can see from the video, that Mr. Holder is standing and he pans downs at one point in time and he looked at the

water it's up to maybe his boots, the top of his boots.

THE COURT: It looked, yeah. At the beginning in Spring Creek, it was at that top of the boots. He then walks west out of Spring Creek into Antietam Creek. He has waders on. It gets up to mid-thigh, that's the moment he says, it's deep.

A. Yes, that's right.

THE COURT: And then it seems to me he walks across Antietam Creek and up onto that bank and begins walking onto the land.

A. That's right.

THE COURT: Okay.

A. Which is mine.

MS. PRAWDE: I have nothing further for Mr. Estes. I'd like to move Plaintiff's exhibit 15 in.

THE COURT: Any objection to 15? I think we already put it in.

MR. HOLDER: No objection.

THE COURT: 15 is admitted.

(Plaintiff's exhibit 15 is admitted into evidence)

END OF TESTIMONY OF BENJAMIN ESTES

THE COURT: Okay, Mr. Estes, you may step down. Ms. Prawde, anything else? Any more witnesses for the Plaintiff?

MS. PRAWDE: Um, the final witness is Lisa Estes. I have no more than fifteen questions for her if I can call her now?

THE COURT: Yes, let's do her now.

MS. PRAWDE: Okay, thank you.

THE COURT: Is that okay Madam Clerk? You okay?

CLERK: Yes.

THE COURT: Madam Court Reporter, are you okay if we just keep going?

COURT REPORTER: Yes.

THE COURT: After Lisa Estes, we will take a break for lunch. It's going to be short.

TESTIMONY OF LISA ESTES

Lisa Estes, having been duly sworn, did testify as follows:

DIRECT EXAMINATION

BY MS. PRAWDE:

BAILIFF: You can have a seat right here.

THE COURT: And you don't need to lean up to the microphone I can hear you until I tell you I can't hear you. Okay?

A. Okay.

THE COURT: Ms. Prawde?

Q. Um, good morning, almost afternoon Ms. Estes. Can you state your full name for the record and your home

address?

A. Lisa Estes. 22 Mt. Hebron Road, Keedysville, Maryland.

Q. And who do you live there with?

A. My husband, our two daughters and my mom.

Q. Who is your husband?

A. Benjamin Estes.

Q. Okay. And what do you do for a living?

A. I'm a homemaker.

Q. Okay. And do you take regular walks in or near Spring Creek or Little Antietam Creek on your property?

A. Yes.

Q. How often would you say you do so?

A. I used to walk two to three times a day for years for twelve years, ten years when recently the past few years I may walk once or twice.

Q. Once or twice a day?

A. Um hum.

Q. Okay. And would you be able to swim, kayak, boat or otherwise float down all of Little Antietam Creek that's on your property without interruption.

A. Absolutely not.

Q. Would you be able to do so on Spring Creek that's on your property?

A. No, absolutely not.

Q. Okay. Have you ever observed any sort of ebb and flow of the tide or any sort of tides in either of the creek on your property?

MS. PEEPLES: Objection.

THE COURT: Overruled. You may answer.

A. No.

Q. In the twelve years of living on the property have you ever seen anyone kayaking on Little Antietam or Spring Creek?

A. No.

Q. Have you ever seen in those twelve years anyone ever canoeing or taking any sort of boat or vessel on Little Antietam or Spring Creek?

A. No.

Q. Have you ever seen anyone swimming or floating on Little Antietam Creek or Spring Creek in those twelve years?

A. No.

Q. Have you ever seen anyone fishing in Little Antietam Creek or Spring Creek on your property in those twelve years?

A. I once saw a man with a fishing rod in Spring Creek.

Q. And did you or your husband ask him to leave or tell him it was private property?

A. Yes.

Q. And Ms. Estes, are you aware that your husband is seeking to enjoin the Holders from entering onto your property including parts of the creek walking or wading in parts of the creek that are on your property?

A. I am aware.

Q. Do you have any concerns about the Holder family standing in, walking or wading in the creeks that are on your property?

A. I do have concerns.

Q. What are those concerns?

A. My concerns are that the Holders have trespassed and damaged our property for years. Mr. Holder is very litigious and he's very aggressive and I'm afraid of him. He's threatened my husband. He sent my husband an email that had a song attached to it. The title I guess was Swamp Song, and it basically said that I have warned you, you didn't listen, be careful where you tread. You might not come out. Basically, implying that within the next day when my husband walked our dogs alone that day Mr. Holder had come onto our property. I saw pictures of him, which appeared where he was screaming in the pictures on our property past within the No Trespassing signs of ours behind him. I don't walk our dogs alone because I'm afraid. I'm afraid, I'm afraid of Mr. Holder

and I don't know what he'll do, when he'll be out there and I'm moreso terrified for our children, our daughters. They don't walk alone. They don't walk the creek by themselves. They don't walk near either creek. Um, and what's even very unsettling is Mr. Holder had submitted a video to my husband awhile back and, um, Mr. Holder was essentially walking up Spring Creek basically in our backyard and on camera you can see him passing by our No Trespassing signs and he's saying on video that he's seen what we're up to. It's very unsettling. You know, everyone has a right to feel safe in their home. They have a right to feel safe on their own property and our daughters and myself I don't feel safe. I don't feel safe. I don't know when he's out there. I don't know what he's doing. I don't know what he's capable of. I feel that he is very aggressive and angry and for all those reasons I don't want him on our property or his family on our property. They've been asked to leave and they continually come there.

MS. PRAWDE: I have nothing further.

END OF DIRECT EXAMINATION

THE COURT: Ms. Peeples, any questions?

MS. PEEPLES: Just one.

CROSS EXAMINATION

BY MS. PEEPLES:

Q. Ms. Estes, I represent Deena Holder in this case and we're different from Justin Holder. Have you ever encountered or met Mrs. Holder?

A. Yes, I have.

Q. Can you explain when that was?

A. Um, three years ago was probably the first time. Um, when she was in Spring Creek with all of her family. And there were, we asked them to leave, that they couldn't be there. My husband said, well you can continue on up but then, you know, you have to take Mt. Hebron Road if you go up because either way to get to Spring Creek you have to cross into our, onto our land to get there. And then another time several weeks after that her and I'm assuming her daughter they were in where Spring Creek and the Little Antietam Creek meet and they were picking up shells and rocks of our creek.

Q. Did you have any conversations with her?

A. Yes.

Q. And can you describe what those conversations were?

A. Well, they were having fun and we were with our dogs and I was with my husband and we said hi and it was a nice day and they were, I'm not sure what she had said what they talked about but we had said be careful because my husband and I had seen really large snapping turtles a

couple weeks prior that. And they were in the area where the snapping turtles were. And we told them to have a good day and we did not ask them to leave that day.

Q. You described previously your, your interactions and fear with Mr. Holder.

A. Um hum.

Q. Has there ever been an occasion where Mrs. Holder on her own has caused you any anxiety or fear or done anything to you to make you feel threatened?

A. I feel anxiety but she's not threatened me. I don't feel afraid of her. I feel anxiety because I feel that they as a whole are litigious and I feel as if our dogs are out there without us because our dogs are there and our dogs, you know, we have a fenced in yard. We own both sides of the creek down there. And they are occasionally out or ahead of us and I wouldn't want anyone getting hurt. Our dogs are very friendly. But because they're litigious people who's not to say that they would try to say our dogs did something.

MS. PEEPLES: I have no further questions. Thank you.

A. Thank you.

END OF CROSS EXAMINATION

THE COURT: Mr. Holder, do you have any particular questions based on the direct examination that was

presented?

MR. HOLDER: Yea, I do.

THE COURT: Why don't you stay right there then and ask them.

MR. HOLDER: Okay. Okay. Sure. I just have an exhibit.

THE COURT: Does that need to be marked?

MR. HOLDER: It does need to be marked.

THE COURT: Madam Clerk.

(Defendant Holder exhibit number 27 was marked for identification)

MS. PRAWDE: And can I see what it is? I'm sorry, before - -

THE COURT: Yes.

MS. PRAWDE: Thank you.

MR. HOLDER: It's a certified public record that you already agreed.

MS. PRAWDE: I just need to see what it is. Thank you.

THE COURT: Hand that to the witness please. What number is that?

MR. HOLDER: That is 27.

THE COURT: 27.

CROSS EXAMINATION

BY MR. HOLDER:

THE COURT: Alright, ma'am, you have in your hand Defendant's exhibit number 27. Mr. Holder, what do you want to ask her about that?

Q. You spoke, you spoke about I came on your property for and complained to the Maryland Department of Environment about things that you were doing you felt it invaded your privacy. Is that, is that fair?

A. That's not what I said, no. I said that you submitted a video to my husband. I was not in - - I've not been involved in any of your communications. I just saw the video that you were seeing what we were up to and you were walking up our creek. I know nothing about the environmental.

Q. You're not aware of any complaints to the Maryland Environmental - -

A. I'm aware that you did make one but I've no information regarding what that may be.

MR. HOLDER: Okay. I'll ask to have that certified public record of the complaint I made admitted as evidence.

THE COURT: So, you did make a complaint.

MR. HOLDER: I did make a complaint.

THE COURT: Mr. Kauffman, let me see it. Ms. Prawde, this appears to be a public record with a certificate

from the records custodian. Do you have an objection to the record?

MS. PRAWDE: No objection to it.

THE COURT: Defendant's 27 is admitted.

(Defendant Holder's exhibit 27 was admitted into evidence.)

MR. HOLDER: Could you hand it to the witness? Or - -

THE COURT: Let me help you out here a little. What are you trying to get her to say?

MR. HOLDER: I'm just, I'm just going to ask her if she ever saw me after the video I made which would have been I guess March.

Q. Have you ever seen me - -

THE COURT: March of what? March of what? Okay.

Q. March of 2020. Have you ever seen me in the Spring Creek after that ever?

THE COURT: After the video did you ever see him in the Spring Creek?

A. Not in the Spring Creek, no.

THE COURT: Okay.

Q. And were you aware that the Maryland Department of Environment asked me to go get pictures?

A. No.

Q. Did you - - Were you - - When we met behind your

house did you inform us your dogs were dangerous and could hurt us?

A. I don't recall our conversation. Our dogs are friendly and our dogs were there so I, I mean if they were dangerous I would have probably not be having a conversation with you about them. They probably wouldn't have let you continue on because you continued on without a care.

Q. Right up the creek to the spring?

A. Yes, after my husband said you could continue on you guys went ahead and walked and our dogs are right there.

Q. Okay. No further questions. Thank you very much.

END OF CROSS EXAMINATION

THE COURT: Okay. Any redirect?

MS. PRAWDE: Nothing further.

THE COURT: Okay, is she allowed to leave?

MS. PRAWDE: She is.

THE COURT: Ms. Estes, thank you very much for your testimony today. You are allowed to leave the courthouse if you wish. Or you are allowed to stay in the courtroom it's up to you.

A. Thank you.

THE COURT: Yes, ma'am, thank you.

END OF TESTIMONY OF LISA ESTES

THE COURT: Just so I have it right, your Complaint to MDE was it looks to me like early 2020?

MR. HOLDER: I think it was January 28 is the date that they asked me to go get the pictures.

THE COURT: Okay.

MR. HOLDER: And I believe January 28, 2020, is the date on that video.

THE COURT: Okay, and then it looks like Resh did an inspection March of 2020.

MR. HOLDER: Of both properties, yes.

THE COURT: Any other witnesses Ms. Prawde?

MS. PRAWDE: No other witnesses, Your Honor. The Plaintiff rests. Thank you.

THE COURT: Okay. Anything else before we break for lunch?

MR. HOLDER: No, Your Honor.

THE COURT: Okay, what time is it? 1:00? 12:09? Can we be back at 1:15?

MR. HOLDER: I can be back earlier than that if you want.

THE COURT: I know you can. 1:15.

MR. HOLDER: Yes, Your Honor. Okay. We will be adjourned until then.

(Whereupon Court was in recess at 12:09 p.m. and

resumed at 1:17 p.m. and the following occurred in open court:)

THE COURT: Everybody have a seat. Okay, we're back on the record C-21-CV-20-430, the matter of *Estes versus Holder, et. al.* I believe the Plaintiff had rested prior to the lunch break, is that right?

MS. PRAWDE: Yes, Your Honor.

THE COURT: Ms. Peeples or Mr. Holder, where shall we begin?

MS. PEEPLES: Uh, Your Honor, I would like to make a Motion for Judgment on the basis of the evidence, based upon the fact that I still believe and aver that water science and whether or not something is navigable or whether something is controlled by the tides or whether something can float. A log is, while lay people can visually observe something, I don't think a lay person has the wherewithal to say a big log or a small log or any other being or vessel cannot float down the river without touching bottom. And I think that the question of navigability depends on the fact that you do require expert testimony. I think that obviously the Plaintiffs in this case are going to testify to what they've seen over the past twelve years but when you're looking at the pictures that have been presented there are various pictures that are taking at different times of the year

and I think that based upon that evidence you don't have consistent photos of the same location at different times of the year verses what something might look like in the Winter versus the Spring versus the Summer. You don't have different pictures which demonstrate how rivers or creeks water can increase after a rainfall versus not a rainfall. The pictures that have been introduced, we don't know and there's been no testimony to state whether it was a drought year, whether it was a rainy year and I think that while Your Honor can sit here and you can observe rocks in a stream, I don't think that meets the threshold of what needs to be determined to be navigable. And for these reasons and without expert testimony I would move for judgment on behalf of Deena Holder.

THE COURT: Yes, ma'am. Do you wish to be heard?

MS. PRAWDE: Thank you, Your Honor, yes. Um, Your Honor, we dispute that there is a need for any sort of expert testimony in this matter. Whether there is an ebb and flow is something that there is no need for an expert to come in here and assist the Court in making that determination. There has been testimony from Mr. Holder as well as his wife who have lived at the property for twelve years who regularly walked the property, have made observations about the depth of the property and made observations about whether there's any sort of tides.

Um, I think as Your Honor had said, people who go to the beach they know what a tide is. Um, Mr. Estes has made clear he knows what a tide is. And that he has not seen any sort of tide there. That is sufficient in and of its self for navigation is whether this satifies the ebb and flow test. There's not a need for an expert to come in and identify whether there were ebbs and flows here.

In terms of pictures of different times of the year, um, that question was asked specifically of Mr. Estes. He has walked the property year round, multiple times a day, year round. He testified that the photos that were shown, um, are consistent with how the property looks on a regular basis year round. He walks Spring, Summer, Fall, Winter. He also was asked specifically about, you know, what if there is a massive rainfall or does the rain change at all the water levels and his testimony was that certainly it may go up very slightly if there's rain. Um, but often not much at all. It's consistent with because this is spring fed the water is mostly the same year round. Again, wide latitude is given to property owners to be able to identify and describe what they're property looks like. I mean most of his descriptions were ankle deep, waist deep, knee deep. That's something that he can easily identify and describe for the Court without the need for an expert needing to

come in and give precise measurements about what a water depth is. So, for those reasons we do not believe that judgment should be entered. Thank you.

THE COURT: Mr. Holder, I'm not going to ask you about argument on this because this one is really just between Deena Holder and Ben Estes, that portion of the case. Do you understand?

MR. HOLDER: I do.

THE COURT: Okay. Having heard the testimony thus far in the case there was testimony that this Plaintiff has walked the property nearly every day for approximately the last twelve years and that his observations are that for the majority of the creeks, the Antietam Creek, the Spring Creek and the Springhead Creek if we call it that, that the water can be anywhere from just above his, his feet in flip flops to ankle deep in boots, sometimes into the mid-calf, maybe to the knee. There are two places that he indicates that it does get fairly deep, maybe waist deep, chest deep. We saw a video of Mr. Holder at the junction of the Spring Creek and the Antietam Creek call that the Spring Creek hole, and then there is the other sort of deeper area down by the railroad. I think we call that the big pool where it is a little bit deeper.

I disagree that this requires expert testimony. The

decision of whether it's navigable is for the triar of fact to determine it is navigable based on the evidence that is presented and I don't know that it requires expert testimony in order for the triar of fact to be able to look at the evidence. Not seeing a case that says navigability must have a determination by the Court of navigability or non-navigability it must have expert testimony in support.

So, looking at the evidence thus far in the case in the light most favorable to the non-moving party, I believe that the facts could be viewed at this point by a triar of fact could result in a determination that the Antietam Creek and the Spring Creek and the Springhead Creek are non-navigable. And therefore, Motion for Judgment is denied.

MS. PEEPLES: Thank you, Your Honor.

THE COURT: Anything else before we start calling witnesses?

MR. HOLDER: Just Motion for Judgment that the Plaintiff failed to set forth sufficient evidence that Uncle Eddie's, the public or any of Uncle Eddie's predecessors and title have ever abandoned, extinguished or terminated their rights to the creek and to the waters as they were granted by the King of England and they still stand to walk in the creek.

THE COURT: Okay. Uncle Eddie's is not here. That motion is denied.

MR. HOLDER: Okay.

THE COURT: Okay. I'll start with you Ms. Peeples. Are you calling any witnesses?

MS. PEEPLES: No, Your Honor, I am not.

THE COURT: Okay. Mr. Holder. Are you calling witnesses?

MR. HOLDER: Yes, Your Honor. The defense calls Mark Hutzell.

THE COURT: Okay, may I have Mark Hutzell from the hallway please?

TESTIMONY OF MARK H. HUTZELL

Mark H. Hutzell, having been duly sworn, did testify as follows:

THE COURT: Hi, sir, how are you?

WITNESS HUTZELL: Okay.

THE COURT: Can you give me your full name?

WITNESS HUTZELL: Mark H. Hutzell.

THE COURT: And what's your address?

WITNESS HUTZELL: 19134 Shepherdstown Pike.

THE COURT: What is it?

WITNESS HUTZELL: 19134 Shepherdstown Pike, Keedysville, Maryland.

THE COURT: We're going to start with Mr. Holder,

okay. He's is going to ask you questions. Allow him to finish his question before you start answering, okay?

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Good afternoon, Mr. Hutzell. Thank you very much for coming. Have you, have you ever lived in Keedysville, Maryland for your entire life?

A. Yes, that's the only place I've ever lived.

Q. Okay, and before you lived at Shepherdstown Pike where did you live prior to that?

A. 28 Antietam Drive for fifty-five years.

Q. Fifty-five years. Okay. And when you lived at Antietam Drive did you walk around the property?

A. Oh, yes, all the time.

Q. What area did you - - How would you describe your property at Antietam Drive?

A. Well (unintelligible) country even though it's in town limits. But, you know it's kind of rural, farm-like setting.

Q. Can you describe where it was at generally?

A. Bordered the Antietam Creek pretty much by three sides.

Q. What bordered the other sides?

A. There's a railroad track that went through.

Q. Okay. Did the railroad track have bridges on

either side of the creek?

A. Yes. But if the creek come around one side then the other side of the bridge.

Q. And was there, was there a time while you were there where they removed the railroad tracks?

A. Yes.

Q. Okay. Did you ever see people swimming near the railroad bridges?

A. Oh, yes.

Q. Who did you see swimming that you know by the railroad bridges or was it just random people?

A. Just random. Some I knew from Keedysville because I grew up there. There was kids that we knew.

Q. Did anybody ever ask you guys permission to go swimming or did they just do it?

A. They just did it.

Q. Did you ever go swimming by the railroad bridges?

A. Oh, yes.

Q. Okay.

THE COURT: Both of them?

A. No, just the one mostly behind my house.

THE COURT: Which?

A. Which would be towards the east.

THE COURT: The eastern one?

A. Yes.

Q. Can you see the Exhibit 1 on the board up there, the easel?

THE COURT: Why don't you approach the board and give him a general idea of what he's looking at. He may have never of seen that in his life.

MR. HOLDER: Okay. (Mr. Holder steps down in the well of the court and looks at easel, Plaintiff's exhibit 1)

THE COURT: As he's going there, Mr. Hutzell, can I just understand something? Do you have generally an idea of what years you lived at Antietam Drive? You said you lived there for fifty-five years.

A. Yes, from 1963. That was my date of birth. 1963 to four years ago.

THE COURT: Okay.

Q. Do you see down at the south portion it says abandoned B&O Railroad there?

A. Right.

Q. And there it says Mary Jane Hutzell. Is that somebody that you know?

A. That's my mother.

Q. Okay. And is this generally the creek area - -

A. Yes.

Q. - - Little Antietam Creek you swam in?

A. Yes.

Q. And the area where you were swimming was it

closer to the railroad bridge or - -

A. Yes, closer to the railroad bridge.

Q. Okay. And are you familiar in Keedysville where the town spring is?

A. Yes.

Q. Did you ever go to the town spring and swim?

A. It's pretty cold water you're not going to swim in that too long.

Q. Okay.

A. It's not that deep but about three feet where it comes out. It's a big spring but it empties into the Antietam it's pretty cold right there too.

Q. Okay. How deep was it when you lived there?

A. Um, about 5 feet I guess.

THE COURT: The spring? Is that what you're asking?

A. The spring itself is about 2 ½, 3 feet when it comes out of its source.

THE COURT: Okay.

A. It's a pretty big spring.

Q. Okay, did you swim there and do there the entire time you lived there pretty much?

A. Pretty much.

Q. Okay. That's all the questions I have. (Mr. Holder returns to trial table.)

END OF DIRECT EXAMINATION

THE COURT: Cross-examination Ms. Prawde.

MS. PRAWDE: Yes.

CROSS EXAMINATION

BY MS. PRAWDE:

Q. Good afternoon Mr. Hutzell.

A. Good afternoon.

Q. Um, and you have not been to Little Antietam Creek or Spring Creek or, well you haven't been to Little Antietam Creek as reflect - Strike that. You have not been to Little Antietam Creek the portion of it that was on your or that you said you swam in since you've left, so since 2018?

A. No, I have not.

Q. Okay. And you said it was a limited area of Little Antietam Creek that you swam in just by the railroad, the southern railroad, is that correct?

A. Yes.

Q. Okay. And about how many feet long was that, that area where you could swim in? If you know.

A. Probably about a hundred feet or so. It's a deeper place in there. Way back here used to be a swimming hole where people would swim in.

Q. And when you say years back about when was that?

A. Maybe before even I was born.

Q. Okay.

A. So, it goes way back.

Q. So, it wasn't a big popular swimming hole when you were living in the property for fifty-five years?

A. Well, I'd say every summer people swam back there. It may not have been a lot but people swam there.

Q. And again, we're just talking about that limited area by the railroad?

A. Yes.

Q. Okay. And do you recall there being lots of rocks in that area by the railroad?

A. There is, yes.

Q. Okay. Did there come a point on Little Antietam Creek after you said it was deep enough to swim where it becomes too shallow?

A. Yes.

Q. Okay. And does that continue north for awhile on Little Antietam where it's too shallow for you or anyone to swim?

A. Yes, pretty much. There's some deeper pockets but yes.

Q. Okay. And if I can approach?

THE COURT: Sure. (Ms. Prawde approaches the well of the court at easel)

Q. So, in this trial we have been referring to this area as Spring Creek. Are you familiar with this?

A. Yes.
Q. And did that abut your property at all or was that part of your property? If you know?
A. The spring was not, no.
Q. Okay. And this area of creek?
A. It emptied into the Antietam Creek.
Q. Okay. But this part was never part of your property?
A. No.
Q. Okay.
A. No.
Q. And you never went swimming over there?
A. No.
Q. And so, you have no personal knowledge about whether that's deep enough for someone to swim in?
A. Well, I've been up there. I've walked up there before.
Q. You've never been swimming in it?
A. No, it is not deep enough to swim in.
Q. Okay.
MR. HOLDER: Just one redirect.
THE COURT: Hang on. Ms. Peeples, any cross-examination?
MS. PRAWDE: Nothing further, Your Honor.

END OF CROSS EXAMINATION

THE COURT: Okay, I'm sorry. Ms. Peeples, any cross-examination?

MS. PEEPLES: No, Your Honor.

THE COURT: Mr. Holder, any redirect examination?

MR. HOLDER: Yeah, just - -

REDIRECT EXAMINATION

BY MR. HOLDER:

Q. So, when you went up to the spring for the fifty-five years you were there you just walked up the spring branch to get to it generally?

A. Pretty much. Just walking in the water.

Q. And when you - - Did you ever walk from the swimming hole up to the spring branch in the water?

A. Oh, yes.

Q. The whole fifty-five years you were there?

A. I wouldn't say the whole fifty-five years but I had been when I was younger.

Q. When you were younger.

A. Um hum.

Q. Okay. Thank you. That's all. Thank you very much.

END OF REDIRECT EXAMINATION

THE COURT: Mr. Hutzell, you lived there a long time, right, your entire childhood I guess?

A. Yes. Exactly.

THE COURT: When did you stop going swimming there?

A. Probably when I was about thirty years old probably.

THE COURT: Okay. Is this witness - - I'm sorry, go ahead.

MS. PRAWDE: I just had a little re-direct (sic).

THE COURT: Go ahead quickly.

RECROSS EXAMINATION

BY MS. PRAWDE:

Q. Um, and Mr. Hutzell you've never kayaked or not taken any sort of boat on the Little Antietam Creek or Spring Creek?

A. No.

Q. And when you had mentioned going up towards Spring Creek just walking had you ever been told by anyone, any property owner over there not to be there?

A. No.

Q. Nothing further.

END OF RECROSS EXAMINATION

THE COURT: Okay, is this witness excused? He may leave the courthouse?

MR. HOLDER: Yes.

THE COURT: Alright, Mr. Hutzell, thank you for your testimony today. I appreciate it. Be careful getting down.

WITNESS HUTZELL: Thank you.

END OF TESTIMONY OF MARK HUTZELL

THE COURT: Next witness.

MR. HOLDER: It would be - - Would you want to stipulate to his brother's testimony would be the same?

(Inaudible response)

MR. HOLDER: I call David Hutzell.

THE COURT: David Hutzell from the hallway please.

TESTIMONY OF DAVID HUTZELL

David Hutzell, having been duly sworn, did testify as follows:

THE COURT: Have a seat. Sir, can you give me your full name?

A. David Wayne Hutzell.

THE COURT: And what's your current address Mr. Hutzell?

A. 19134 Shepherdstown Pike.

THE COURT: Mr. Holder is going to ask you some questions, okay. Do you know who Mr. Holder is?

A. Yeah.

THE COURT: To our far left, right?

A. Uh huh.

THE COURT: He's going to ask questions. Don't start answering until he finishes his question.

A. Okay.

THE COURT: Once you're finished with those I may have some other folks ask you some questions. But we will take our time, okay. Mr. Holder.

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Good afternoon Mr. Hutzell. Thank you for coming.

A. Good afternoon.

Q. Have you lived in Keedysville, Maryland all of your life?

A. Well, we've lived in Mt. Lena for - - I lived in Mt. Lena for five years. Rest of it I've been in Keedysville.

Q. Okay, and prior to living on Shepherdstown Pike, where did you live in Keedysville?

A. 28, well actually lived in the house below and up on the hill at 28 Antietam Drive most of the time.

Q. Okay, and could you describe the property for me?

A. What do you mean?

Q. What was your property, where was it at? Just general location.

A. Back Antietam Drive. Last house back.

Q. Over the railroad tracks?

A. Yeah.

Q. On the creek, near the creek?

A. Near the creek.
Q. Okay. And when you were there did you ever see anybody swimming in the creek?
A. Yeah.
Q. Did you see them swimming the whole time you were there?
A. Off and on, yeah.
Q. Okay. Where at in the creek did you see them swimming generally?
A. Down over the hill there on the corner down over the rocks. And then the place behind the house too that they used to swim.
Q. Was it near the railroad bridge?
A. Yes.
Q. Okay. And was over the hill by the rocks was that near the confluence where the spring branch and the - -
A. No, it's on down on the next corner. I think they did swim back there some too where the branch came out but it's really cold there.
Q. Did you ever swim there?
A. Yeah.
Q. Did you ever go up to the spring?
A. Yeah.
Q. How'd you get there?

A. I'm - -

THE COURT: I think he's asking did you walk there?

A. Yeah.

Q. Did you walk - - Did you just walk up the spring branch to get to the spring generally?

A. Yeah.

Q. Okay. And did anybody ever give you permission to do it or did you just go up there?

A. Nobody ever said I couldn't.

Q. Okay.

A. They never talked to me or anything.

Q. Alright. That's all the questions I have. Thank you, sir.

END OF DIRECT EXAMINATION

THE COURT: Stay right there, okay. Ms. Prawde do you have any questions for David Hutzell?

MS. PRAWDE: Yes, thank you, Your Honor.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MS. PRAWDE:

Q. When did you move from 28 Little Antietam?

A. It's been about six years now.

Q. And when was the last time you swam in Little Antietam Creek?

A. Oh my, it's been years because I, I was little

when I was doing that, probably around ten, fifteen. I haven't been swimming in it since then I'm sure.

Q. Okay. And you've never kayaked or canoed or taken any sort of boat or inner tube in the creek?

A. Not that I know of.

Q. And you've never seen anyone in a kayak or canoe or a boat going in the creek?

A. Yes, I have seen them in a boat, yeah.

Q. Okay. What kind of boat was that?

A. I don't really - - It's just a small boat.

Q. Was that one time?

A. Yeah.

Q. Okay, when was that?

A. It's probably been ten or fifteen years ago.

Q. Okay. And in all the other times you lived on the property you never saw anyone else in a boat or canoe or anything like that?

A. Not that I know of.

Q. Okay. And where was that that you saw the boat on that one time, ten, fifteen years ago?

A. Well, they came from down in Keedysville up around and come up so far and then turned around and went back down.

Q. Was it like near the abandoned railroad?

A. Yes.

Q. Okay. And do you know where Mr. Estes property is?

A. Not really.

Q. Okay. And you had mentioned you had seen individuals or people swimming in the water, is that right?

A. Um hum.

Q. Okay. And if I can approach?

THE COURT: Yes. (Ms. Prawde approaches well of court at easel)

Q. So, this is what we've been calling, I know this might be a little hard to see, but (unintelligible) abandoned being a railroad down here?

A. Yes.

Q. And then going north Little Antietam and then this other creek we can call it Spring Creek, which runs here to the spring head, do you see that?

A. Um hum.

Q. Okay. And you've never seen anyone swimming in this, this spring creek what we're calling?

A. No.

Q. Okay.

A. Because it's actually too cold to swim in.

Q. Okay, and do you have any idea about how deep or shallow this area is at all?

A. It's not very deep.

Q. Okay. And then where, approximately where was it the times you saw people swimming on Little Antietam Creek? Was it closer to being near a railroad or somewhere else?

A. Well, they go up from B&O Railroad, you go up around the turn and then on another little turn and you used to swim on the other side. And then come on up to right where the cold spring comes out and then next bridge was back there just a little ways down there was a deep place in there where they swim.

Q. Are there points along that way that get pretty shallow?

A. Yes.

Q. Talking like ankle deep or so, if you know?

A. Yeah, it's pretty much like that some places, yeah.

Q. Some places were like not parts of Little Antietam Creek that you say were near your property?

A. Yeah.

Q. Okay. And the times you said you had seen some people swimming on Little Antietam Creek was that more than fifteen years ago?

A. Yes.

Q. Okay, and you have no idea whether those

individuals swimming were given any sort of permission by property owners or neighboring property owners?

A. I have no clue.

Q. Okay. And do you recall by the railroad area in the creek if there was sort of significant amount of boulders or rocks, things that would make it a little challenging to get by?

A. No, not that I really know of.

Q. Just one more question for you Mr. Hutzell. You had mentioned the boat you had seen I think you said ten or fifteen years ago. And was that sort of more north on Little Antietam Creek, more towards up here?

A. It was actually (unintelligible) where the cold spring comes out cause lot shallower up above that too.

Q. And can you identify for me roughly where cold spring is?

A. Well, right where the other little stream comes out.

Q. So, this area?

A. Yeah.

Q. Okay. So, somewhere right around here?

A. Uh huh.

Q. Okay, but again, you think it would be too shallow to go onto Spring Creek with any sort of boat?

A. Yeah.

Q. Okay. And you never saw any sort of boat down south on Little Antietam towards the railroad?

A. Yeah, toward the railroads where we always saw them.

Q. The boat. The one time you saw the boat?

A. Down that way, yeah.

Q. Okay. The one time you say it was from here and it went down to the - -

A. Yeah.

Q. Okay. And what kind of boat was it?

A. Just a little looked like a fishing boat or a canoe whatever.

Q. Okay, and the boat, did it come from Keedysville up towards Spring Creek if you know?

A. Yes.

Q. Okay, alright. Nothing further.

END OF CROSS EXAMINATION

THE COURT: Mr. Holder, any follow-up?

MR. HOLDER: No, Your Honor. Thank you very much Mr. Hutzell.

THE COURT: Well hang on a second. Stay right there.

MR. HOLDER: I'm sorry, Your Honor.

THE COURT: No, it's okay. You're saying that boat came from Keedysville?

A. Came up from - -

THE COURT: Came from Keedysville?

A. Yeah, from where the bridge is down there in Keedysville if you go across up that way.

MR. HOLDER: I believe that be the Route 34 bridge.

A. Yeah.

THE COURT: That's what I'm trying to understand. I'm trying to understand which bridge it came under to get to the point that it turned around because there's two railroad bridges, right?

A. Yes, it's right in Keedysville. Because there's a damn below that.

THE COURT: Near your property? Near the old 28 Antietam Drive where you lived for years?

A. Yeah. Yeah.

THE COURT: There are two bridges?

A. Yes.

THE COURT: I'm going to call it, there's one to the west, right? Okay. And there's one to the east.

A. Yes.

THE COURT: Okay. The one to the east - - Was that your brother that was just here? Mark?

MR. HOLDER: That was Mark.

A. Yeah.

THE COURT: Your brother just described the one to the east that's shown on that plat.

A. Yeah.

THE COURT: As the one behind your house. Do you understand?

A. Oh, you're talking about that. That was the railroad bridge behind the house.

THE COURT: Okay. Is there another bridge to the northwest of the house?

MR. HOLDER: Your Honor - -

THE COURT: What I'm asking is if a boat came from Keedysville and turned around I want to know on that plat which way the boat came. Can you step down there? Be careful, be careful. (Witness steps down to the easel in well of the court) I want to orientate you a little bit sir.

A. Yeah.

THE COURT: Okay. Do you see where all those, see on the left side where that chart is of a bunch of numbers and everything?

A. Yeah.

THE COURT: That. Okay, put your finger right there. Okay, bring your finger down a little bit, down, no just straight down, straight down, straight down. Stop. I think that's about where your house was 28 Antietam, okay. And the creek wraps around, right?

A. Yeah, around the top.

THE COURT: Can you see - - Can you see the creek there?

A. I don't know.

THE COURT: Okay.

A. It's hard for me to figure out on here.

THE COURT: What I'm asking is I believe that the creek wraps around right where your finger was.

A. Yeah.

THE COURT: Okay. So, you see the little legend up there at the top that says north?

A. Okay.

THE COURT: Okay. So, if that's your house there where your finger was tell me where Keedysville is. Just show me where you think it be, which direction?

A. I can't follow.

THE COURT: It's okay. Okay.

MR. HOLDER: I might be able to help him.

THE COURT: He's not - - I'm not sure if he knows which direction the boat came from.

MR. HOLDER: I can help you if you don't mind. I've lived in Keedysville all my life.

MS. PRAWDE: We would object to him interjecting to him.

MR. HOLDER: There's a state highway bridge that comes across Main Street, I think that's the bridge he's

saying he originated at.

A. Yeah, that's the one I'm talking about.

THE COURT: Okay.

MR. HOLDER: And then he came up past this spring works to the second railroad.

MS. PRAWDE: Again, I would object to - -

THE COURT: It's okay. Overruled. So, you think the boat came from where the state highway bridge is and then turned around?

A. Yeah, it only could come up so far because the water was too low.

THE COURT: Okay. So, the boat couldn't go through what's on that map because the water was too low?

A. Yeah.

THE COURT: Got it. Thank you. I'll look on a map to see where state highways - - What number was it? State Highway Bridge what?

MR. HOLDER: It's Maryland (unintelligible) Main Street, Keedysville.

THE COURT: Okay.

MR. HOLDER: The bridge and then the middle damn is down below it.

THE COURT: Okay. Is this witness excused?

MR. HOLDER: He is. Thank you very much.

THE COURT: Mr. Hutzell, thank you for your testimony

to leave today. You are free to leave the courthouse sir.

WITNESS HUTZELL: Thank you.

THE COURT: Thank you so much.

END OF TESTIMONY OF DAVID HUTZELL

THE COURT: Next witness.

MR. HOLDER: And, Your Honor, that's the first I've ever heard of the boat, ever, never before this. I was very surprised.

THE COURT: Understand. I was interested to see which direction it came because I think he was confused. He said something about a bridge and I just don't know which, nobody asked him which bridge it came from.

MR. HOLDER: Aaron Holder I would - -

THE COURT: Who is it?

MR. HOLDER: Aaron Holder.

THE COURT: Aaron Holder?

MR. HOLDER: Yes.

THE COURT: Yes.

TESTIMONY OF AARON HOLDER

Aaron Holder, having been duly sworn, did testify as follows:

THE COURT: Sir, could you give me your name?

A. Aaron Holder.

THE COURT: And what's your address, sir?

A. 20704 Spinning Wheel Place, Germantown, Maryland.

THE COURT: Okay. Justin Holder is going to ask you some questions. Let him finish his question before you start answering. When you all are done there may be some questions from the other folks, okay?

A. Understood.

THE COURT: Mr. Holder, go ahead.

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Good afternoon, Mr. Holder. Thank you for coming. Did you ever live in Keedysville, Maryland?

A. Yes.

Q. How long did you live in Keedysville, Maryland?

A. About twenty-four years.

Q. Are you familiar with a town's water source the town spring is?

A. Located off of Mt. Hebron Road. I believe that's where it is.

Q. Are you familiar with the Little Antietam Creek in Keedysville, Maryland?

A. I am.

Q. Did you ever swim, play or recreate in the Little Antietam Creek in Keedysville, Maryland?

A. I have.

Q. How long of a period have you done that for?

A. At least ten to fifteen years of my life in Keedysville.

Q. Was it a - - What parts of the Little Antietam Creek could you describe that you played in?

A. Are we talking the entire length of the Little Antietam Creek?

Q. Actually - -

THE COURT: Mr. Holder, if you need to orient him to where we're talking about why don't you do that because I don't to talk about the whole Antietam Creek if it's not relevant.

Q. Agreed. This is a certain plat 9186, Plaintiff's exhibit 1. There's an abandoned B&O Railroad at the south end. There's a plat of land called Mary Jane Hutzell. This was done for the Hopes. This is Mt. Hebron Road. And there's been testimony that the spring in Keedysville is in this parcel here called Washington County Commissioners area. Are you familiar after I've showed you generally what this area of the creek is from the railroad bridge at the northwest corner of plat 9186 as it comes up to the confluence of the spring and wraps around the peninsula shape piece of land and then what they've been calling the spring branch head it actually flows from the east to the west into the Little Antietam Creek to this corner here that is designated now formerly

town of Keedysville in the northeast corner? So, we're only asking you questions specifically about these areas of the creek.

THE COURT: Are you familiar with those areas, sir?

A. Yes, I am.

THE COURT: Okay.

Q. And have you played in those areas in the creek?

A. Yes, I have.

Q. What kind of activities have you done in those areas in the creek?

A. I've walked the entire the Little Antietam that is shown there. I've walked the entirety of the, I believe you're calling it the Spring Run that is shown there. Um, I've ridden my bike jumping off the edge of that creek into the town run. Friends and I have played sports type of activities in that creek on multiple occasions. I've floated down that creek on multiple occasions. I would say that I've spent most summers between the age of about ten or eleven through fifteen at some point in both of those bodies of water.

Q. And the depths of the bodies of water throughout the year how much have you noticed that they fluctuated?

A. So, on average I would say that, you know, you notice multiple feet rising and lowerings depending on the weather. I remember in 1996 it was quite

significant.

Q. How significant? How deep was the water in 1996?

A. Uh, so after the blizzard of 1996, the water was certainly at least probably six or seven feet above most of the portion that's shown on the southeast of this map was under water after the blizzard of 1996.

THE COURT: Even areas outside of the creek bed?

A. Yes, it was above the creek bed.

THE COURT: You're talking - -

A. Yes.

THE COURT: - - flood.

A. Yes.

THE COURT: Okay.

Q. Could you come - -

THE COURT: I think he knows.

Q. Are you familiar with that map, should I have him point it out to you?

THE COURT: I understand what he's saying. It was a major flood it sounds like.

Q. Okay, and how many different friends did you have down there at a time playing in the creek?

A. Uh, at one time at least four or five accompanying me in the creek.

Q. Okay, that's all the questions I have. Thank you very much for your time Mr. Holder.

END OF DIRECT EXAMINATION

THE COURT: Ms. Prawde, any questions?

MS. PRAWDE: Yes, Your Honor.

CROSS EXAMINATION

BY MS. PRAWDE:

Q. Mr. Holder, when you described as a child being in Little Antietam Creek and specifically this portion that we're talking about here, where did you live?

A. 2 Bedrock Circle, Keedysville, Maryland.

Q. Okay, and how close is it to where Mr. Holder currently lives?

A. This individual here?

Q. I'm sorry, yes.

A. So, what is his address?

THE COURT: Antietam Drive.

A. In Keedysville. Um, so if you were to in terms of birds eye distance, walking distance.

Q. Have you ever been to your brother's home?

A. I've been to that property. I don't know if I've ever been inside the home.

Q. When was the last time you've been to that property?

A. Probably over two years.

Q. Okay. And so, what I'm talking about Mr. Holder's property how close was your childhood home to

where that property is?

A. Uh, well, I could ride a bike there in probably under a minute if you asked me to at that time in my life.

Q. Okay, and so is that how you would get there as a child is you would ride a bike?

A. Often times. Well, so, I didn't visit that property as a child, Mr. Holder's property as a child.

Q. What part did you, what area did you go to?

A. So, I entered from the north on this map. And there's multiple ways to access it.

Q. So, you're saying you entered up here or?

A. So, I can point if you would like.

Q. Sure, that be helpful, thank you. (Witness steps down to easel)

THE COURT: Careful getting down.

A. So, one way that I entered was this further off this map the railroad bridge where it passes what is now the line house. You can walk the creek up that way.

Q. Okay.

A. You can walk the creek up that way. I actually entered from this property here where Bell Lane meets Mt. Hebron Road. You could ride your bike down this way and then there's a property where I had a friend named (unintelligible) Santulli who lived so I could ride that

way as well as I would come past the spring and go that way as well.

Q. Okay. And so, what are of the creek were you primarily spending time in?

A. Primarily near the confluence but I also played a lot of - -

Q. And by the confluence could you just point out where you're referring to?

A. Where the Little Antietam is meeting this town run.

Q. Okay.

A. And then also where Mt. Hebron crosses the town run I spent a lot of time there as well.

Q. Okay, so most of the time you spent was up here not more down here towards the southern railroad, not the northern one?

A. I usually was only walking through there. There wasn't a whole lot to play around.

Q. Okay. Was that deep enough for you to swim or to float down in this area by the, what we're calling the southern abandoned B&O Railroad?

A. I can't say for sure. I didn't try floating in it every time I was there.

Q. Okay. And were you walking in the creek, was that year round or was that primarily summertime or?

A. Uh, I probably went a little further into the spring and fall season but I don't believe I did a lot of walking in the creek during the winter. I may have road my bike down through the shallower parts of the town run during the winter times.

Q. And when was the last time you swum or walked or anything in either creek?

A. Um, actually so when I visit my brother's property I'm sure that I stepped into the creek at that time. I don't know the last time that I swam in the creek though.

Q. Okay, and when you say stepped in is that walked into the creek?

A. Yes.

Q. Okay. And what area was that?

A. Near the confluence but from the other side so from what we were talking about from his property.

Q. Okay, and when you said as a child that you had floated on the creek was that just on your back, was that on a tube or how was that?

A. Uh, so I used to tube before but yes just on my back.

Q. Okay. And it would be too shallow for you to take a tube all the way down from the northern part all the way down to that southern area by the B&O Railroad?

A. Just on the Little Antietam?
Q. Correct.
A. I don't believe it be too shallow.
Q. But there would be times where you would have to lift up your tube or to move your tube where it was touching the water?
A. There be times where you might scrape, yes.
Q. Okay. And you've never been kayaking or taking any sort of boat or canoe on the creek, on this particular area of the creek?
A. Not on this section of the Little Antietam.
Q. Okay. And do you know who Mr. Estes is?
A. I do not.
Q. Okay. Has anyone ever given you any sort of permission to use or to walk in any of the creeks that are shown on this area of the property?
A. I believe when I was younger I had a friend who was in Cub Scouts, Collin Santulli. I don't know what his father's name was but they lived at - - I'd have to point again.
THE COURT: That's okay. I know where you said he lived.
A. Okay.
THE COURT: Sort of north of Mt. Hebron Road, right?
A. He's off of Mt. Hebron Road, yeah, okay.

THE COURT: Yes.

A. So, he's given me permission to ride my bike down into his property before.

Q. Okay. And so, when you primarily when you were riding your bike or going into the creek as a child you're understanding it was with permission of someone?

A. Uh, so I later in life, you know, after sometime later in the '90's or 2000, I don't believe I had explicit permission from that individual any longer.

Q. And the last several years no one has ever given you permission, including Mr. Estes, to be in the creek, is that right?

A. That's correct.

Q. Okay. Okay, nothing further.

END OF CROSS EXAMINATION

THE COURT: Ms. Peeples?

MS. PEEPLES: No, Your Honor.

THE COURT: Mr. Holder, any redirect sir?

REDIRECT EXAMINATION

BY MR. HOLDER:

Q. Do you know who Maxwell and Devon Hope is?

A. I do not.

Q. So, there's no chance Maxwell or Devon Hope could have ever given you permission to be in the creek?

MS. PRAWDE: Objection.

THE COURT: Overruled. He already said he doesn't know who they are so.

Q. Go ahead, you can answer.

A. I don't believe so.

Q. Alright, and I'm going to give you a hypothetical. At that lower portion of the creek there's an abandoned railroad and say I went up there and I cut down twenty big saw logs of white, of White Oak and I wanted to get it from that southern portion of the Antietam Creek where it crosses across the abandoned railroad and I wanted to get it down and around to the other side of his property do you think I could float the logs all down through there?

MS. PRAWDE: Objection.

THE COURT: What's the objection?

MS. PRAWDE: To the relevancy of it and to the hypothetical whether he has any sort of personal knowledge about what someone could do with those types of trees or even what those types of trees are.

THE COURT: Sustained.

MR. HOLDER: Okay, no more further questions.

THE COURT: And I'll tell you Mr. Holder, being able to float one long, you know, some logs from one area of the property to the other area of the property I'm going to tell you right now that to me does not indicate

commercial use.

MR. HOLDER: Well, I mean I was just sticking on the property.

THE COURT: As is, as it relates to navigability.

MR. HOLDER: Okay.

THE COURT: I mean could it be done? Maybe it could be done. But whether that means it is commercially viable and therefore navigable I'm not going to allow him to answer that. Do you understand?

MR. HOLDER: Understood.

THE COURT: That's why I'm objecting or that's why I'm sustaining the objection. Any more questions for Mr. Holder, Mr. Holder?

MR. HOLDER: No, thank you.

THE COURT: Okay, you are free to leave sir. Thank you very much for your testimony.

END OF TESTIMONY OF AARON HOLDER

MR. HOLDER: Defense would call Donna Levey please.

THE COURT: Donna?

MR. HOLDER: Yeah.

THE COURT: Donna Levey please.

TESTIMONY OF DONNA LEVEY

Donna Levey, having been duly sworn, did testify as follows:

THE COURT: Ma'am, could you give me your name

please?

A. Donna Guyer Levey.

THE COURT: Could you give me your address?

A. Is 9 Dogstreet Road, Keedysville, Maryland.

THE COURT: Mr. Holder is going to ask you some questions. Please allow him to finish his question before you start answering.

A. Okay.

THE COURT: Once you all are finished having question and answer so other folks may have the same, have questions for you as well. Do you understand?

A. Yes, sir.

THE COURT: Mr. Holder.

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Good afternoon Ms. Levey. Thank you very much for your time. Have you lived in Keedysville, Maryland your entire life?

A. With the exception about four years where I lived in Boonsboro but, yes, I was born 1952 and I lived there until I got married in 1972 and then I lived in Boonsboro until my oldest daughter was born and then shortly after she was born we went back to Keedysville.

Q. And while you were there did you ever - - Do you know where the Little Antietam Creek is and the spring

TESTIMONY OF AARON HOLDER

Aaron Holder, having been duly sworn, did testify as follows:

branch?

A. Yes.

Q. And when you were a kid did you ever play and swim in the spring branch?

A. We swam at the end of Mt. Hebron Road. At the very end it used to be a road that you could actually drive through the stream and that was before the bridge was built out to the spring house. And we used to swim and play in there all the time.

Q. Would that be near John Burtner's house?

A. Yes.

THE COURT: You understand I don't have any idea where John Burtner's house is, right? Okay.

Q. Okay. Do you know if John Burtner is a neighbor to Mr. Benjamin Estes?

A. Yes.

Q. Okay.

THE COURT: Is it on 9186?

MR. HOLDER: Probably up to the top right.

THE COURT: Okay, I have my own copy, I'll look.

MR. HOLDER: Okay. You go around the corner on the top.

THE COURT: Okay, I'll find it. But I understand her testimony being she swam up near Mt. Hebron near Burtner's house.

A. It was - -

MR. HOLDER: Near Burtner's house.

THE COURT: Okay. Is that correct?

A. Yes, that is correct.

THE COURT: Okay.

Q. Did you ever walk to the spring?

A. Yes with my family a lot. We would go down and get watercress.

Q. Okay. How did you get there?

A. Um, we went across the concrete bridge that is close to the Burtner property.

Q. Okay. Did you ever swim by any of the railroad bridges in Keedysville?

A. Not the railroad bridge. The bridge behind the post office off of Main Street. Some of the boys in Keedysville had made a log wooden raft and we had that docked at that bridge behind the post office and we would, you know, take that upstream and downstream on the creek.

Q. Okay, did anybody ever give you permission to swim in the creek or swim at Mt. Hebron Road?

A. No.

Q. Okay. That's all my questions. I appreciate it.

END OF DIRECT EXAMINATION

THE COURT: Stay right there. Ms. Prawde, do you have

any questions?

MR. PRAWDE: Uh, yes, Your Honor.

CROSS EXAMINATION

BY MS. PRAWDE:

Q. Ms. Levey, can you describe what your relationship is to Mr. Holder?

A. Yes, I'm his mother-in-law.

Q. Okay, so you're Deena's mother?

A. I am.

Q. Okay. And Mr. Levey, just briefly, I'm going to direct you to this big plat, which is Plaintiff's exhibit 1. I know it's a little hard to read and figure out. Do you have any - -

THE COURT: Help her - - Just orient her to where Mt. Hebron Road is. Orient her - -

A. Yeah, cuz I can't see very well.

THE COURT: Just orient her where Mt. Hebron is.

MS. PRAWDE: Okay.

THE COURT: And where sort of where the creek is, is wrapping around.

MS. PRAWDE: Okay.

THE COURT: And where the railroad it.

Q. Um, so, Ms. Levey, do you see where it says Mt. Hebron Road to off north here?

THE COURT: Just be careful getting down. (Witness

steps down from witness stand to easel.) You are allowed to get down.

A. Thank you because I don't want to say something that's not accurate.

THE COURT: I know.

Q. Okay, so, do you see where it says Mt. Hebron Road?

A. Yes.

Q. Okay. And then I'm also going to orient you to where the spring head is, which is over here.

THE COURT: It's not shown on the map, ma'am, but we all believe that the spring head is right where she just pointed.

A. Okay, this is where the spring building actually is, is that correct?

THE COURT: Let me see your finger. Yep.

A. Okay, and where does the creek go this way towards the Burtner property.

Q. So, based on where Mt. Hebron Road is do you have a sense of where the Burtner property is?

A. Not, looking at this, no.

Q. Okay, and in orientation to where the spring head is do you have any idea of where his property is?

A. Mr. Burtner?

Q. Mr. Burtner's.

A. I don't know. It says existing barn. Can you point out to me where Mr. Burtner's farm is?

Q. Unfortunately, not.

THE COURT: We cannot, ma'am.

A. Okay.

THE COURT: I don't know where it is.

A. I am not familiar with the plat, sir.

THE COURT: Okay, have a seat.

A. I'm sorry.

THE COURT: It's okay, no. No problem. Have a seat, ma'am. Mr. Estes, let's - - If she doesn't know where it is on the plat, she doesn't know.

MS. PRAWDE: Okay. I just have one more question, Your Honor, if that's okay?

THE COURT: Okay.

Q. Um, and so we had oriented you to Mt. Hebron, you recognized where that was.

A. Yes, the road. It was not the railroad.

Q. And then the railroad that you were referring to do you have a sense of - - I'm sorry?

A. I'm sorry. I'm answering before. But the railroad we were not on the railroad bridge. I'm talking about the bridge down by the Keedysville Post Office, that is not where the railroad bridge is.

Q. Okay. And where is that located by the

Keedysville - -

A. That is on Main Street on the corner, down behind Main Street on Kauffman Farms Road.

Q. Okay.

THE COURT: Okay.

Q. I have nothing further. Thank you.

END OF CROSS EXAMINATION

THE COURT: Mr. Holder, any redirect?

MR. HOLDER: No, Your Honor.

THE COURT: Mrs. Levey, thank you so much for being here. I appreciate it. Careful getting down.

WITNESS LEVEY: Thank you. And I'm free to go, sir?

THE COURT: Yes, ma'am, you are.

END OF TESTIMONY OF DONNA LEVEY

MR. HOLDER: Um, the Defense calls Christine Morral.

THE COURT: Christine Morral. Deputy, can I have Christine Morral out of the hallway?

THE COURT: Ms. Morral, come on up please.

MS. MORRAL: Where should I go, I'm sorry.

THE COURT: I'm going to direct you. I'm going to have you walk around here, right to that microphone. Walk on the other side. Be careful getting up and then just remain standing for me for just a moment, okay.

MS. MORRAL: Okay.

TESTIMONY OF CHRISTINE MORRAL

Christine Morral, having been duly sworn, did testify as follows:

THE COURT: You can have a seat there. It swivels but it doesn't move back and forth. You don't have to lean forward to the microphone. Sit back and relax. You don't have to lean forward. I can hear you. Okay. Alright. Mr. Holder is going to begin asking you questions. Let him finish his question before you start answering. When he's finished with questions I'll find out if the attorneys have questions for you, okay?

A. Okay.

THE COURT: Mr. Holder. Actually, could you state your name?

A. Christine Morral.

THE COURT: Morral.

A. Um hum.

THE COURT: What's your address?

A. Sorry?

THE COURT: What is your address?

A. 138 Stonecrest Circle, Keedysville, Maryland.

THE COURT: Alright, Mr. Holder.

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Good afternoon, Mr. Morral, thank you very much for coming. How long have you lived in Keedysville,

Maryland?

A. Uh, six years. Oh, oh, Keedysville, Maryland, we've lived there since 2013. Our current address we've lived at for six years.

Q. Okay, and your current address Stonecrest Circle we've been talking about the exhibit up on the easel here, it's a certain plat.

THE COURT: Mr. Holder, why don't you go up to the plat so you can just orient her. Orient her a little bit, okay.

Q. Generally, there's an abandoned - -

THE COURT: So, that you know Ms. Morral, your property is not on this plat. Okay.

A. Okay.

THE COURT: Okay this is north and east of your house.

A. Okay.

Q. There's an abandoned B&O Railroad here. And if that railroad comes through, here's Main Street, so you would be up in the Stonecrest Development, maybe on this like corner, that if you looked out your backyard and looked down over that bridge this is like the area of the creek you look at off your deck in the back. If you look kind of down overtop where - - I think Mr. Young's property is going to be further south, okay, and here's

the Hutzell property, which was - -

THE COURT: Does she know the Hutzells?

A. I don't know them.

THE COURT: Are you - - Are you oriented enough to understand what this is a plat of? Mr. Holder, point to where her house would generally be, just point on it.

Q. Would that be fair do you think?

THE COURT: I think that's fair. I know what the plat looks like. So, your house is about where Mr. Holder's finger is, okay.

A. Okay.

THE COURT: And out your back door - -

A. Okay.

THE COURT: - - faces this plat?

Q. Yea, like Stonecrest Circle would be like right here.

A. Okay.

THE COURT: See. Do you see what I mean?

A. And where the railroad used to be is right there.

THE COURT: Yes, you see it diagonal.

Q. Yes, where - -

THE COURT: But we're only getting a little piece of that railroad there, okay.

A. Okay.

THE COURT: Okay. Do you have questions about the

plat you want to ask her?

MR. HOLDER: No. No, not generally.

THE COURT: Oh, okay.

Q. Was there a time in May of 2020 when I came to your house, knocked on your door and invited you to a party, talked to you for a little bit?

A. Um, first, I guess, before I answer anything I should probably bring this to the Court's attention. There are actually two documents that are already on record. One is a partial Protective Order for me.

THE COURT: Okay.

A. And one is a reply that he made when the attorney asked for one.

THE COURT: Let me see it. Yes. Let me see.

A. And I don't know if that question has to deal with one or two of the Protective Order.

THE COURT: Okay.

MR. HOLDER: It was foundation.

THE COURT: Okay. It appears that in this case I had issued a Protective Order in favor of Ms. Morral, who's not a party to this suit. That Mr. Holder was permitted discovery including deposition concerning only the following two issues. Her knowledge of the location of the property line between the lands of the Plaintiff and the Defendant. And any statements made to her by any

party to this case concerning the location of the property line between the land of the Plaintiff and the Defendant. Okay. Both of those things I limited you to about the location of the property line.

MR. HOLDER: Okay.

THE COURT: The location of the property line has been decided.

MR. HOLDER: Okay.

THE COURT: Okay. Proffer for me what you're attempting to get out of this witness and how it is relevant the issue of whether I should issue an injunction and whether the water is navigable. Just proffer to me. Tell me what you, what you have there.

MR. HOLDER: She wrote an email and in the email she described the creek as being owned by the State. And just communal knowledge, that's all.

THE COURT: Okay.

MR. HOLDER: Communal knowledge of what somebody thinks the creek is general. As of somebody that lives in Keedysville.

THE COURT: Okay. What she thinks. Get back to the microphone. What is that marked?

CLERK: 28.

(Defendant Holder's exhibit 28 was marked for

identification.)

THE COURT: You just want to get her to say that she wrote an email at some point in the words the creek is owned by the State?

MR. HOLDER: Just the conversation - - I mean, basically, we had a conversation which was statements about the property, statements I made, to her, what she thought of those statements and then she drafted an email to the mayor based on the statements in that email and I was just, you know - - It seems relevant to the testimony by Mr. Estes about the MDE and the regulation, the video of me in the creek, what I said I was doing, the certified MDE documents. It kind of ties it together.

THE COURT: Well, I think what you were doing in the creek along with the certified MDE records, I understand what you were doing in the creek. I don't know if I need a person who lives in another neighborhood to tell me anything about that.

MR. HOLDER: Alright. That's fine.

THE COURT: Whether she thinks, whether she thinks the creek is owned by the State is not relevant. And I don't sense that that's what the email says. Are you asking me to take the email as her saying that she thinks the State of Maryland owns the creek? Is that what the email says?

MR. HOLDER: I believe that's what - - I mean I believe - -

THE COURT: That she thinks the, that's what she thinks.

MR. HOLDER: At least at the time she wrote it I thought so. Yeah.

THE COURT: Okay.

MR. HOLDER: By the context I think that's what you would infer, sure.

THE COURT: Why is her belief important to my determination?

MR. HOLDER: It's common knowledge of property and the usage in the community. The fact that we had a public swimming - - I feel like we - -

THE COURT: You've had multiple say it as kids they swam in the area.

MR. HOLDER: Even as adults back - - Especially back near her house at that swimming hole that it's always been a swimming hole.

THE COURT: Okay.

MR. HOLDER: Just generally what I was doing wasn't, you know, particularly I don't know that a lot of people find it particularly offensive when you're trying to build an access for people to get to a swimming hole that's been used for years and years in the community.

THE COURT: I'm not questioning that. Okay. But I had limited her involvement in this case, two very specific things. One, whether she knew where the property line was. And, two, whether essentially you or you, Holder or Estes, had ever told her where you all thought the property line was. And the reason I limited it in this case is because if I'm correct, you're suing her on two other cases. One now.

MR. HOLDER: Well, ones an appeal.

THE COURT: One is an appeal and one is still active.

MR. HOLDER: True. That is correct.

THE COURT: So, I think her testimony in this case is still limited by the Protective Order.

MR. HOLDER: Okay.

THE COURT: Okay?

MR. HOLDER: Yes, sir.

THE COURT: Okay. And we're not going to talk about the property line because I already made that decision.

MR. HOLDER: Understood.

THE COURT: Okay. Do you wish to be heard at all Ms. Prawde? I'm basically excusing this witness.

MS. PRAWDE: I have nothing to add.

THE COURT: Ms. Peeples?

MS. PEEPLES: No, Your Honor.

THE COURT: Okay. Ma'am, you're excused. Thank you.

WITNESS MORRAL: Thank you.

END OF TESTIMONY OF CHRISTINE MORRAL

MR. HOLDER: I think the exhibit got marked though.

THE COURT: It's here.

MR. HOLDER: Okay, alright.

THE COURT: Mr. Holder, before we call the next witness.

MR. HOLDER: Yes.

THE COURT: The reason she's excused is because of my prior Protective Order. Even if I had kept her here her belief as to who owns the water and who owns the land underneath is irrelevant. I don't need a neighbor - - I don't need a neighbor to tell me that. That's my job to decide based on the law not based on what she believes. So, I wouldn't have let exhibit, the exhibit in anyways. Okay.

(Defendant Holder's exhibit 28 was not admitted into evidence.)

MR. HOLDER: I was more geared to towards like prescription and just public prescription of it and communal knowledge not necessarily the legal title definition but that's - - I understand.

THE COURT: I'm not sure that we're here on prescription.

MR. HOLDER: Okay.

THE COURT: You can argue it if you wish but - -

MR. HOLDER: Understood.

THE COURT: We're here to decide whether there is an injunction and what will that injunction say if there is an injunction. Okay, who is your next witness?

MR. HOLDER: Is Mark Pettijohn out there?

THE COURT: Mark Pettijohn?

MR. HOLDER: Yes.

THE COURT: I'm concerned he's not there. That's taking too long. Hang on let's see what the deputy says.

DEPUTY: There's no one in the hall or the restroom, Your Honor.

THE COURT: Mark Pettijohn. What do you want to do?

MR. HOLDER: Well, I have John Burtner coming at 3:30 because I told him to be here.

THE COURT: Do you have any other witnesses in the hall?

MR. HOLDER: No. Can I have five minutes to try to round up what witnesses I have?

THE COURT: Is there anybody else still in the hall?

DEPUTY: There's no one in the hall, Your Honor.

THE COURT: Okay. I wonder if he walked away. Was he here?

MR. HOLDER: He's almost here he said.

THE COURT: Oh, so he was not never here.

MR. HOLDER: He was on his way. He was stuck in Winchester and he texted me he was on his way up so. I told him hey man don't rush because - -

THE COURT: We got a lot of people to do.

MR. HOLDER: I hate having people waiting on me.

THE COURT: I understand. Let's do this. Why are you calling Mr. Pettijohn? Who is he?

MR. HOLDER: Um, he is a mechanic I work with that's come to the property taking his daughter tubing, kayaking down the creek.

THE COURT: Okay.

MR. HOLDER: Just usage of - -

THE COURT: Okay.

MR. HOLDER: - - same, pretty factual witness about the use of the creek.

THE COURT: And what about Mr. Burtner?

MR. HOLDER: He owns the property. The Town of Keedysville minutes that I had, Mr. Burtner is very concerned similar concerns that Mr. Estes of the spring running dry. He's lived there forty-five years. He can talk about the water heights of the water over the course of time.

THE COURT: Okay. So, how far away is, are either - -

MR. HOLDER: Mark will be here in ten minutes but I can always, I can go up, you know, and I got a couple things get in.

THE COURT: Well, if you're testifying that's probably the time to do it.

MR. HOLDER: Okay. I'll go ahead on up if that's alright. I got to get these guys marked. Is it alright if she marks them first?

MS. PRAWDE: And if Your Honor, if we can just have a five minute bathroom break whenever it is convenient.

THE COURT: Why don't we do that after he marks them up.

MS. PRAWDE: Thank you.

THE COURT: Before he begins his testimony.

MR. HOLDER: If I can show them to you quick.

MS. PRAWDE: Sure.

MR. HOLDER: Okay.

THE COURT: As you all are doing that why don't we take five, ten minutes. We will be in recess.

MR. HOLDER: Okay.

(Whereupon at 2:25 p.m. court was in recess and resumed at 2:38 p.m., and the following occurred in open court:)

THE COURT: Everybody have a seat. Are you ready?

MR. HOLDER: I am, sir.

THE COURT: Alright, we're back on the record then, Estes versus Holder, C-21-CV-20-430. Mr. Holder, please raise your right hand.

TESTIMONY OF JUSTIN HOLDER

Justin Holder, having been duly sworn, did testify as follows:

THE COURT: Have a seat sir. Would you state your name?

A. My name is Justin Holder.

THE COURT: You don't have to lean in. I know it's a habit. Just - - People get there and they feel like they have to lean in. You don't have to. And your address, sir?

A. It's 308 West Chapline Street in Sharpsburg, Maryland, 21782.

THE COURT: Okay. You are one of the Defendants in this case, yes?

A. That is correct, Your Honor.

THE COURT: Okay. What do you want to tell me?

A. I'm going to start with some housekeeping here.

THE COURT: Go ahead.

A. I have an exhibit 5. It was a US Army Corp and Harbors Act permit to cross a navigable waterway. I found that in a public information search in Keedysville, Maryland, looking up water and sewer issues. That is an

area where Ms. Levey discussed playing in the creek that's where they crossed the creek to bring a sewer line to the water treatment plant.

THE COURT: Okay, slow down. Do you have the exhibit?

A. The exhibit 5 is probably down there. It's in evidence.

THE COURT: Okay, so there was a Town of Keedysville, exhibit number 5, Town of Keedysville Army Corp of Engineers statement. Okay.

A. Yes.

THE COURT: Got it.

A. And that is associated with this exhibit, Defense exhibit number 29. MDE permit, authorization number 2005 61839/05-NT-3012 for waterway construction.

THE COURT: Is Defendant 29 in evidence yet?

A. It's not. I'm moving to admit it now. It's a document I found at the Town of Keedysville certified public records as being pertinent to the creek and the MDE, US Army Corp of Engineers permit.

THE COURT: Okay. You're looking at exhibit number 29. There's a certificate of the records custodian from the town of Keedysville. Is there any objection to 29?

MS. PRAWDE: No objection.

THE COURT: 29 is admitted.

(Defendant Holder's exhibit

29 was marked for identification and admitted into evidence)

A. I have in my hand Defendant's exhibit 30. It's a certified public record from the town of Keedysville. It's a designated as closing documents from Steve Cvijanovich to Allied Insurance, true and accurate copy of the record of the town of Keedysville, generally just saying that the work for the Keedysville water line improvements on Mt. Hebron Road were completed. This would be associated with the permit and the US Army Corp of Engineers permit. I move to admit Defendant's exhibit 30.

(Defendant Holder's exhibit 30 was marked for identification.)

THE COURT: Any objection to 30?

MS. PRAWDE: Yes, Your Honor. I'm going to object to the relevance of this or at least get a proffer as to what the water line that's by Mt. Hebron Road that is not my understanding at all part of the boundary issues or the land issues that are in dispute what relevance that has to any of this. Thank you.

THE COURT: Would you proffer to me, what the relevance is regarding exhibit number 30?

A. Exhibit number 30 just is that they finished the job. It, it's - -

THE COURT: I don't even know what job you're talking about.

A. Oh, um, I mean, just vaguely relevant for supporting documentation for the other two exhibits that were previously admitted. It just goes with it. She just gave me the files in a four part section. This is really a four part file but she broke them down into four different sections but this was the entire file I have including - - This is the actually the exhibit 31, is the actually the did docs.

THE COURT: Okay, I don't know that I'm going to need the bid docs.

A. You might not. I just - - It talks about scope of work and what they're doing in the creek.

THE COURT: Okay.

A. So, I didn't know if you would want them. If you don't, I'll keep them.

THE COURT: What project was this all for?

A. That was the sewer line crossing to the town of Keedysville's spring treatment plant because the, from my understanding after review of records at MDE, at a public information search, the Boonsboro town lagunes were leaking and they had contaminated the Crestview wells and

the Town of Keedysville spring with fecal coliform.

THE COURT: I generally remember that in the news.

A. So, they had to do an emergency - - Yeah, they had to do an emergence crossing of the creek.

THE COURT: Okay.

A. With a sewer line. They had to obtain not only and MDE authorization but also a US Ports and Harbors authorization under Section 10 - -

THE COURT: To run a line from where to where?

A. Under Mt. Hebron road over to I believe the new - - Oh, I'm sorry. Mr. Estes may know this a little better than I do. (Witness steps down to easel). I believe the new pump station is this, is the pump station up here?

THE COURT: Well, hang on. You can't ask him.

A. Oh, I'm sorry. I believe the pump station is up on here on the Town of Keedysville and the spring house because it's up on a hill. And I think that when they did the pump station the ran a sewer line from Mt. Hebron Road and crossed the creek.

THE COURT: What creek?

A. The spring - - The creek where Donna Levey played in up near - -

THE COURT: Burtner's house.

A. Burtner's house. Yes. So, I don't think, I don't think it's on this map.

THE COURT: Okay, but just so that I understand what your are proffering. You believe that there came a time - -

A. Here it is.

THE COURT: - - that either the County Commissioners or the Town of Keedysville or the Town of Boonsboro probably had to all get together and they needed to do what? Build a new pump station? (Witness returns to witness stand.)

A. Well, they built a new pumping station but that was more from my understanding to deal with the pressures and the lines because Boonsboro's reservoir was so much higher than Keedysville it was popping our pipes.

THE COURT: Okay, so, they may or may not build a pumping station right near the spring house, right?

A. They did build that about the same time and they ran a sewer line to it to get rid of the, you know, because they have really good clean water standards in Keedysville and Boonsboro.

THE COURT: So, they're pumping something out?

A. They're pumping things out that don't belong in the water.

THE COURT: Okay. And that's what these documents go to, number 29, number 30?

A. Correct. And the fact that they, you know - -

THE COURT: Let me stop you. How is that project relevant to the two decisions I need to make? First decision being whether to issue an injunction. Second decision what does that injunction say as it relates to navigable water?

A. Well, the Plaintiff has taken the position that it's non-navigable water in fact. And I took the position in legal arguments that to the extent it's relevant and to the extent the Court finds its navigability is relevant to the decision of an injunction that once a federal agency finds a creek or waterway to be navigable in fact it's navigable in law.

THE COURT: Okay.

A. And that finding of fact associated with that permit.

THE COURT: Okay. I get it now.

A. Okay.

THE COURT: In which one of these documents is the Federal Government saying that this is navigable water?

A. Number 5 when you get an approval from a Corps - -

THE COURT: Show me, show me in the document where it says that or what language you're relying on for making, drawing the conclusion that that is the Federal Government determining that the spring branch is

navigable water. Because, Mr. Holder, I'm not make a decision today because I'm going to read that.

A. Um hum.

Q. And I don't want to guess what you're talking about if you think it says it specifically show me where or if you think it is read within something else.

A. This top paragraph.

THE COURT: Okay, so the top - - You want me to look at the top paragraph of what we will call page 3 of the exhibit and it looks, it's really, it's page 3 of the exhibit but it is page 1 of what appears to be either a letter or the permit from the Army Corp of Engineers. Does that sound right?

A. That is correct.

THE COURT: And you want me to read the top paragraph of page 5? Of, of, exhibit 5?

A. (Unintelligible).

THE COURT: I'll read the whole thing. I just want to be sure where you are saying that the language is that the Federal Government made that determination.

A. Generally, upon the recommendation of the Chief of Engineers and under the provisions in Section 404 of the Clean Water Act as amended in Section 10 of the Rivers and Harbors Act of 1899 thirty-three USC 403, "the Secretary of the Army hereby authorizes the discharge of

dredged or fill materials or the placement of structures into the waters of the United States including wetlands and navigable waters."

THE COURT: Okay. And so, you think that is a determination the words including wetlands and navigable waters means that the army has taken the position that the spring branch is navigable?

A. Of the United States, correct. Using the Appendix 4 that I was citing from yesterday of the EPA Guide of the Federal Determination of navigability on the EPA website.

THE COURT: Okay.

A. They have what - -

THE COURT: I get it. I - - Okay. Okay, so, Exhibit 29 has been admitted, correct?

CLERK: Yes.

THE COURT: Has Exhibit 30 been admitted?

CLERK: Not yet.

THE COURT: What is Exhibit 30?

A. Just the sign off on the completion that the work was done. It's not - - It just - - She gave me four documents in association with this permit. She broke them down. If you don't want the other two we don't need to bring them in.

THE COURT: What's the next one, number 31?

(Defendant Holder's exhibit 31 was marked for identification)

A. Pre-bid sign in sheet and addendum, same, you know - - There's a plat.

THE COURT: Any objection to 31?

MS. PRAWDE: Um, Your Honor, I had already I believe objected to 30. We also object to 31 again to the relevancy of I believe we're talking about the water line or the water plant which is not located on the property and have stopped or proffered or shown what that would have anything to do with in terms of the bed of the creek which is what we're discussing within this property. Thank you.

THE COURT: Understood. The objection is overruled. I'm going to allow it in as a matter of completeness just so that - - I'm sort of interested to understand what this water project was and the word navigable does show up on page 1 of the Army's Corp of Engineers Permit. I'm not suggesting right now that that means that the Army Corp has in fact found it to be navigable. I have to read that sentence and figure out what that sentence really means. But in order to be, so that I can have a complete understanding 30 and 31 are admitted. What else Mr. Holder?

(Defendant Holder's exhibits 30 and 31 are admitted into evidence.)

A. So, initially when this dispute with Mr. Estes and the property arose I began searching you know land records and the deeds and one important thing I thought about the property boundary that came into contention is there is a genuine difference between what we've been looking at, at Plat 9186 and what's defined on Plat 10955. And the pertinent part of that is on a deed at book 6070 folio 200.

THE COURT: Do you have this marked as an exhibit?

A. I have it marked as Defendant's Exhibit 34.

THE COURT: Okay.

(Defendant Holder's exhibit 34 was marked for identification.)

A. And - -

THE COURT: What is the liber folio?

A. Well, the first it's going to be 6070 folio 197 and - -

THE COURT: 6070?

A. Yeah. Page 197.

THE COURT: 197. What is this a deed from whom to whom?

A. This is the deed where in previous cases we've talked about Deena Holder and Uncle Eddie's sort of reconfiguring the lot.

THE COURT: Oh, okay.

A. And this is what plat 10955, this is the deed that makes that complete.

THE COURT: This is the reconfiguration deed?

A. Correct.

THE COURT: Okay.

A. And it at page 200 there's a paragraph of the description basically as a result of the herein above conveyance the grantor grantee intend to abandon the previous boundary line between their respective parcels and to reconfigure the parcels as shown on said plat 10955 such the grantees resulting parcel hereinafter as described. And generally, the description goes into the Little Antietam Creek behind what would be the yellow house stays in the Little Antietam Creek until it gets to the north end of L8 on plat 9186. Follows the same courses and distances of the fence line that Mr. Frederick used as a monument in 1993 until it comes out to the Little Antietam Creek at the top of what is L5 and that stake that is in the creek somewhere it's been contested whether it's in the middle or the edge but that stake in the creek and then the deed runs down the creek

the two following courses until it meets the lines running along the lands of Maryland Natural Resources up in a westward direction. So, the description in plat 10955 is significantly different on the southern two lines as it does call those southern two lines directly into the creek that I don't believe it would be abandoning any appurtenant rights to accretion. And I would like to move to admit Defendant's exhibit 34 is a certified copy of that deed.

MS. PRAWDE: Your Honor, we would object. I think that goes to this deed as already well been considered by the Court it goes directly to the boundary line dispute, which has already been established at summary judgment the Court's interpretation of what, where that boundary is.

THE COURT: Anything Ms. Peeples?

MS. PEEPLES: No, Your Honor.

A. I just add, Your Honor, this is the - -

THE COURT: Why does that go to either of the two issues that I'm dealing with, injunction or navigability?

A. Well generally you now the Holder and Uncle Eddie's side of the coin, um, I believe like I spoke with you earlier the one of the statutes I found very early in this case was the Chapter 129 of the 1862 especially at Section 45 that gave the owners of land bounding on

navigable waters the same rights as those - -

THE COURT: Can I see that?

A. Yes, Your Honor. And I have read some case law and I acknowledged the Court's decision that plat 10955 was a matter of estoppel and when you sever the fast lands you can sever the rights to the fast lands to the extent that the Court would determine that was the intent. It was not the intent on the southern two lines at least of that creek and - -

THE COURT: Well, you're citing to page 200.

A. 200.

THE COURT: But on page 201 doesn't the deed then said lands being all the proposed reconfigured parcel 414 as shown on the plat of subdivision and reconfiguration for parcels 1270414 as shown and recorded on plat 10955.

A. Yes, yes, that's what I'm saying.

THE COURT: Right.

A. That's his legal description of the property.

THE COURT: That's what I found it to be. Okay.

A. Okay.

THE COURT: In summary judgment I found - -

A. Yeah. Yes.

THE COURT: - - 10955 is the line.

A. Exactly and that's just the legal description that goes along with that plat.

THE COURT: Okay.

A. That's all. It just Mr. Estes has represented to the Court that he believes there's land, you know, in between the west side of the creek at that southern two lines where the deed, the actual deed that goes with the plat - -

THE COURT: I'm not, I'm not here to go out and survey the land. I found, I found that the line is the 10955 line.

A. Correct.

THE COURT: Right. I'm not going to go out there and tell - - I'm not going to go out there and stand in ankle deep water or on rocks or up in the trees and say here's where the line is. If you want absolute certainty where it is then I guess a surveyor is gotta go out there and plat 10955 in fact on the ground and paint a line.

THE COURT: But I'm not going to sit here today and say the line, L1 for example, I don't know where L1 is. L2, L3, L4, L5. I'm not going to sit here and say I know exactly where that falls exactly in the water or not in the water.

A. Okay.

THE COURT: That's, that's a job of a surveyor.

A. Sure.

THE COURT: I found which plat is the right plat

10955.

A. Okay.

THE COURT: Nonetheless, this deed is a record of this courthouse. If you wish to argue its relevance in closing argument you can. But I'm not going to keep out a document, you know, it is the reconfiguration plat that I've already looked at a hundred times in this case.

A. Yes.

THE COURT: Defendant's 34 will be admitted.

(Defendant Holder's exhibit 34 was admitted into evidence.)

A. And I had another land record with the Clerk. I think it was a deed from 1770 but I can't find it with me now. Do you still have it over there by chance because I don't believe it got admitted in.

THE COURT: Let me go through what was not admitted.

A. It may have been - -

THE COURT: Number 6 was not admitted.

CLERK: (Unintelligible).

THE COURT: You have 6.

A. Um, can I step down and see if I left it on my desk?

THE COURT: Sure.

A. Okay, thank you.

THE COURT: Number 11 was not admitted. Number 24 was not admitted.

A. Good think I brought another copy.

THE COURT: What do you think it was marked?

A. I believe it was number 6. I know you did. I remember holding it. But I don't know where I put it. I just looked through my stuff.

THE COURT: We will try and find the real exhibit 6 but let's mark a new one. 6. Yes. Exhibit 6.

A. And I'm still under oath. It is the exact identical record certified.

THE COURT: I'm sure it is.

CLERK: I have it as 7.

THE COURT: The 1770 deed was number 7?

CLERK: I have number 6 as the (unintelligible) 2022 deed as (unintelligible).

A. That is true.

CLERK: And the deed is 7.

THE COURT: I have - - Is number 7 already in?

CLERK: You reserved it to discuss it later in the case but it was marked but not - -

THE COURT: Number 7 is marked?

CLERK: 6 and 10 were both marked.

THE COURT: So, which one do you want to do?

A. I'll do number 7. 6 is - -

THE COURT: Let's mark this as number 7 please. Thank you.

(Defendant Holder's exhibit 7 was marked for identification.)

A. Thank you, Your Honor. So, in conducting the research I looked at the first deed that was sold and I have in my hand Defendant's exhibit 32 is a copy of liber 408137.

(Defendant Holder's exhibit 32 was marked or identification.)

THE COURT: 408?

A. Uh, 137.

THE COURT: Okay.

A. And the important part of the deed is on the second page to this case at the fourth line down is, I'm sorry the third line down. "That the land hereby conveyed being a part of a tract of land called the Re-survey on Fell Foot Enlarged and a part of a tract on land called Gorgon's Purchase but I would believe that this is Gorgon's Purchase because that's the land patent in Keedysville that is west of Fell Foot Enlarged. And that's Defendant's exhibit 32. And in Defendant's exhibit 7 it's a deed from Jacob Hess to Christian Hess

in Frederick County. And it's 1770 the deed was made. And it's a deed for land that I've seen similar calls as to where Mr. Estes land is now and including the Watkins property. I know from land records that the first call on Gorgon's Purchase was actually if you're standing at the peninsula and you look up on the hill to your left there's a black walnut tree up on that hill and I heard that that was generally the area - -

MS. PRAWDE: Your Honor, I'm just going to object to the relevancy of this testimony to the matter that we're dealing with in this trial.

THE COURT: Well, I don't think we've gotten to the relevancy yet of whatever this deed may say, so. Overruled at this point.

MS. PRAWDE: Okay.

A. And, um, this deed grants to Christian Hess and reserves the rights and in about the middle of the deed you can see a big section that says, "To have and to hold" and he reserves the rights except the water course of Little Antietam Creek and the draft of the water flowing from the great spring through the said part of Gorgon's Purchase with the land he does, does fully and wholly reserve to himself and his heirs to have and to hold the land part of Gorgon's Purchase and all the bargain," so on and so forth in the deed. So, the

important part that I think is that he is reserving in perpetuity to his heirs and assigns forever and I believe that that would grant a express right to the waters of the Little Antietam Creek and the draft of the Big Spring Branch. So, I would move to admit - -

THE COURT: To where?

A. To the remaining lands of Gorgon's Purchase which would include lands described on this deed as being part of Uncle Eddie's and folio 408137 his predecessor, the Hutzells, as being appurtenant to the land that he's running with the land to be in the waters of the Little Antietam Creek and the Great Spring Branch and I do believe a deed is presumed good and you know, presumed to be true and it is rebuttable but I believe they are relevant to the use of the water by me as an agent assigned, licensee, it's a trespass. I'm allowed to use the title of a Plaintiff or a stranger in a trespass case. I just have to prove that I got a right to be there through somebody's good title and this is good record title that Mr. Estes has not presented any evidence that has been abandoned, terminated or extinguished to be in that water.

THE COURT: Was Mr. Estes land part of Fell Foot Enlarged or Gorgon's Purchase?

A. From, from reading this deed Mr. - -

THE COURT: I mean Gorgon's Purchase and Fell Foot Enlarged must have been big pieces of property.

A. They were. The re-survey of Fell Foot Enlarged is the deed that I relied on that sets the boundary as the east side of the creek. You know, that's where everything gets wacked but.

THE COURT: Who's side of the creek is Fells Foot Enlarged?

A. It would have been (Core) back then and it would have been Hess on the West in 1792 March 15, 1792, that would have been Hess to the west, Core to the east and then Gorgon's Purchase is the land more up towards Keedysville. And it actually goes out it would have followed the Spring Branch and been to the north of the Spring Branch and then I believe Mr. Welty got it. And then that would be Land Record BB619 where there was a dowery. The Chancellor came out set the boundary in the center of the creek there. Land Record S457 the Commissioners came, set the boundary in the center of the creek coming up from Jeff Young's property up to the confluence and following the Spring Branch. So, this deed would have subjected Mr. Estes' property that he received, whatever he received to this reservation of this express easement. His, he would be the serving estate and the Hutzells would be the dominant estate from

my understanding after reading the land records, talking to all my experts.

THE COURT: Okay.

MS. PRAWDE: Your Honor, we would object to the testimony and to the relevancy of the relevancy of the testimony as well as to the deed itself. Um, first and foremost in terms of the deed being applicable to Mr. Holder, Mr. Holder is not the property owner of that property. It's Uncle Eddie's or Deena's their argument to make whether they have any sort of assertion to title or easement there. He is not the property owner. Additionally, um, it's, again, already been established at summary judgment where the property line is, where that boundary line is. This is not a new deed that's coming out of nowhere. This is something that has been part of that discussion and that argument. Additionally in terms of this notion of reserving the right except water rights of Little Antietam Creek through Gorgon's Purchase, again, we're not talking about water rights. We're talking about the land itself. We're talking about that creek bed where that land is. It's already been established that that creek bed is part of boundary of Mr. Estes' property. And that's not pertinent to - -

A. I would say that - -

THE COURT: Hang on. Hang on.

MS. PRAWDE: And additionally, Mr. Holder is not any sort of expert as to, um, where - - He's not any sort of expert related to anything related to this.

THE COURT: Ms. Peeples?

MS. PEEPLES: I have no argument on this issue.

THE COURT: Very well. Do you wish to argue the point? She's making an objection.

A. Yeah, I would just in rebuttal I think it's the Court's decision of what rights it actually grants. If it just grants rights to the water perhaps it isn't relevant but if the Court finds after reviewing it, it grants more than that then those the Plaintiff hasn't put forth sufficient evidence to show they've been abandoned, extinguished or terminated. They're relevant to an injunction if I have a right as a manager to be there. And their land records. I read them. The first one says Gorgon's Purchase. This says it's reserving to the heirs and assigns forever of land with Gorgon's Purchase. My understanding as a reasonable person of the law in this state is that that type of easement is appurtenant. It runs with the land. And that, you know, it would be benefit to the guests and licensees and invitees of Uncle Eddie's.

THE COURT: What's the liber folio?

A. Uh - -

THE COURT: 1770?

A. Oh, it is Liber, hang on one second. Liber 0 Folio 9.

THE COURT: Liber 0?

A. Yes. And that's in Frederick County, Your Honor. We didn't become - -

THE COURT: That's recorded in Frederick? Okay.

A. Yeah. 1776 we became Washington County.

MS. PRAWDE: Your Honor, if I can make one more point.

THE COURT: Sure.

MS. PRAWDE: I mean there's been no foundation about where Gorgon's Purchase even is. If that's even part of this.

THE COURT: Well, that's what I'm sitting here thinking. That's what I'm worried about. Okay.

MS. PRAWDE: Part of this, my understanding it's never been platted by any surveyor. It's not mentioned in any deeds that come thereafter that have been at least introduced in this case. So, you know, Gorgon's Purchase could be anywhere to the east that's not even part of what's being discussed here to the west it's not been established.

A. I filed an Affidavit in conjunction with the Motion to Dismiss in August. An Affidavit does have the

land records for the entire chain of title back to this land. And they are in the record of this case to my understanding of that Affidavit.

THE COURT: It doesn't mean they're in evidence.

A. I understand.

THE COURT: Record of the case is not the same as evidence and what you're doing here today is you're taking all the research you have done and you're telling me sort of sort of the conclusion of it. And you're basing it also on what your experts have told you probably through their, through their research.

A. That is correct.

THE COURT: And what is where. You can't, you can't - - I don't think that I can accept testimony from a party who is repeating to me what an expert has told them. Therefore, the objection is sustained.

A. Can I ask for reconsideration?

THE COURT: I've already made my decision. You're telling me what experts have told you and that is not the way to get expert testimony into evidence. Exhibit number 7 is not admitted.

(Defendant Holder's exhibit 7 is not admitted into evidence.)

A. Finally, I have Defendant's exhibit 33, which I

did investigate in the Land Records and it's generally a contract between Jacob Hess and John (Core), allowing Jacob Hess to flood the lands of John Core in exchange for three acres that he had exchanged up by the Spring Branch. I've checked the land records and a good faith search that contact has never been extinguished by any right of record.

(Defendant Holder's exhibit 33 was marked for identification.)

THE COURT: Hang on a second. Hang on a second. Number 7 is not in. Madam Clerk, what about number 32?

CLERK: I don't have 32 either.

THE COURT: 32 is not admitted for the same reasons as number 7. Okay, what's that? Number what?

A. The contract between Jacob - -

THE COURT: What number exhibit?

A. Oh. It is exhibit 33.

THE COURT: Uh huh. What's the date of the contract? If you can tell?

A. April 20, 1799.

THE COURT: And what is the liber - - April 20?

A. April 20 - -

THE COURT: 1799. What's the liber folio, do you have one?

A. Yeah, I do. It's actually it's April 21st.

THE COURT: Okay.

A. And it's liber M folio 487-489, certified copy from the Washington County Courthouse.

THE COURT: And what are you saying that is?

A. This is a contract between Jacob Hess and John Core allowing Jake (Apess) to flood John Core's lands in exchange for three acres to build a damn. The mill damn was around the property behind the yellow house.

THE COURT: Okay, on - -

A. Basically, Deena Holder's in between Main Street close to the other railroad bridge.

THE COURT: So, not shown here on exhibit 1.

A. Not shown here.

THE COURT: It's up around on the - -

A. On west side of the peninsula.

THE COURT: Understood.

A. And the three acres was up near the Washington County property there labeled on plat 9186.

THE COURT: Okay.

A. And as far as I know this contract I've looked through the land records it's never been rescinded in any right of public record. I have no personal knowledge or fact that would have constituted a, you know, abandonment of these rights.

THE COURT: And that's what you're relying on to say that you could go build a bridge in order to make all - - Or you could build a damn to make this navigable.

A. And at one point in time this water level was much higher because there was a damn.

THE COURT: I understand. But earlier today I think we or maybe it was yesterday - -

A. We did.

THE COURT: - - there was a discussion about you having the right to build a damn in order to make this area navigable.

A. Yes.

THE COURT: Is that the contract upon which you're relying?

A. This is part of the contract in the Maryland Environmental Law 5-503. You know, it would have to have a permit. I'd have to go get a permit to do so. The State does allow you to build damns.

THE COURT: Let me see exhibit number 33. Did you have number 33 Ms. Prawde?

MS. PRAWDE: I believe I was shown it before. Yes, I have seen it.

THE COURT: Any objection to 33?

MS. PRAWDE: No objection to it.

THE COURT: And this was a contract between who?

A. Jacob Hess and John Core. On Fell Foot, a resurvey of Fell Foot Enlarge liber G620, folio 621 of the Washington Land Records. Would have been the resurvey of Fell Foot Enlarged and on that survey Jacob Hess owned to the east bank of creek and John Core owned further east of lands basically Austin Flook. There's still a stake on the east bank of the creek in Land Records. Predecessors to Mr. Estes' property. It's my believe at one point the railroad came through, they built and embankment. The creek moved probably considerably west and that's where this property line dispute originated.

THE COURT: Number 33 will be admitted. And then what did you want me to compare the Maryland Environmental Law 5 - -

(Defendant Holder's exhibit 33 was admitted into evidence.

A. 5-503 on Waterway Obstructions.

THE COURT: Okay. Relating to the ability to build a damn.

A. Yeah, and that's, I think the regulatory authority came down in the '30's under the Maryland, there was a damn act or something in Maryland in the '30s. I didn't really get into that too much.

THE COURT: Okay. What else do you have?

A. I have a picture of my daughter in the canoe I tried to admit.

THE COURT: That was - - Do you have that Madam Clerk? Kayak.

A. Kayak, yeah.

THE COURT: Defendant's number 11.

A. Number 11. Yeah, I took that picture generally standing close to the end of L8 looking north towards the railroad bridge. It was March, right after this, March 2020 right after this property dispute started and - -

THE COURT: So, where you're standing here on Defendant's 11 are you on plat 9186?

A. Yeah, I would say I'm generally near the end of that island that the State was on standing on land probably.

THE COURT: So, really you're facing south towards the bridge.

A. Oh, I'm sorry, yes. I'm facing south. I was incorrect.

THE COURT: Any objection to 11?

MS. PRAWDE: No objection.

THE COURT: And when was this taken?

A. Uh, March of 2020, so springtime.

THE COURT: March 2020, okay. Number 11 is admitted.

(Defendant Holder's exhibit 11 was admitted into evidence.)

A. Is it alright if I go down and get two more marked here?

THE COURT: Sure.

A. Lastly, I have two pictures of the creek.

THE COURT: Okay. Defendant number what?

A. Defendant number 36 and 38. 35 I'm sorry.

(Defendant Holder's exhibits 36 and 35 were marked for identification.)

THE COURT: 35 and 36.

MS. PRAWDE: Mr. Holder, can I just approach and see what these are before we start? Thank you.

THE COURT: Yes, of course.

MS. PRAWDE: Were these produced in discovery?

A. I don't believe they were.

MS. PRAWDE: Then we're going to object.

A. Okay. She's right they weren't produced in discovery.

THE COURT: Alright, they will not be admitted.

A. Okay.

THE COURT: May I have them?

(Defendant Holder's exhibits

35 and 36 were not admitted into evidence.)

A. Yes, yes.

THE COURT: Number 35 and 36 not admitted. Okay, what else? What do you want to tell me?

A. Um, generally, I grew up in Keedysville, Maryland. It's common for children to play in the creek throughout the creek. Nobody asks permission to play in the creeks. There was a swimming hole. I also rode bikes up across the railroad tracks by Mr. Estes' neighbor, Jeffrey Young. These properties were both basically abandoned. Mr. Young's house was abandoned until he moved in maybe towards the end of the 80's and then Mr. Estes' property Tommy Remsburg had it. He lived- - He was a sheriff in Boonsboro.

THE COURT: Okay.

A. Sometimes he ran cows out that way. Sometimes he didn't. They basically had fences on both sides of the creek. We played anywhere in the creek that we wanted to. I generally liked to play on the other side of the peninsula on the west with a larger railroad bridge jumping off there is deeper. But I'll go up to the Spring Branch like everybody else. We liked to lay in the spring. You know, jump in the water. It's cold, you jump in you watch the snakes from across the spring. You

kind of just did and ran around all down through here. And in 1991 Richard Jollis, he was my Cub Scout leader so he moved in down there. And then, you know, as I moved to Sharpsburg and got older I didn't go down so much. Sometimes I would take my daughter down to where Donna talked about swimming, Donna Levey talked about swimming in Mt. Hebron Creek. Never really got any push back from anybody. Never asked anybody's permission. Just did it and when I walked up the creek in Mr. Estes's video that's the only time other than the, the time he saw me following my daughter up there that I've been in his creek. There was at one point a probation order entered and related to a criminal matter where I was ordered by Judge Long to stay off the property. I did so. When I was down after you issued Summary Judgment I walked down to see, you know, take a look at the property and I saw Mr. Estes across the, across the creek and there's two trees down. I waved to him and he, I would say more like blew kisses back to me from the tractor, I think would be fair. And, um, I've always been, tried to be neighborly. I never crossed the line that you set. I respect the Court's orders. If that's the boundary and you make a decision there's no need to enjoining anybody. I'm just not going to do it because I'm not allowed to do it. I wouldn't have done it. I wouldn't have been in the

creek. I believe that the creeks are the public's highways. I believe that the legislative intent that you'll see with House Bill 797 shows that the access to these waterways it's just traditionally been especially in the colonial states of Maryland that if you want to go out and flyfish and walk in the creek, yeah, you might need to get a license. Maryland can regulate what you do in there. But ultimately it's covered. You trust your government is going to protect your rights to these public areas and I believe and I still do believe that I have a right to walk through that creek until this Court tells me I do not and at which point I will respect that. And that's all I have to say to you, sir.

THE COURT: And that was House Bill - -

A. 797 in 2013.

THE COURT: Of 2013?

A. Um hum.

THE COURT: Okay. I believe that's the end of his testimony.

MS. PRAWDE: My apologies, Your Honor.

THE COURT: That's okay. Ms. Prawde?

CROSS EXAMINATION

BY MS. PRAWDE:

Q. I don't have too may questions for you but I do have some, Mr. Holder. The time when you recorded the

video you were walking through Spring Creek, is that correct?

A. Generally, the, uh, probably like I'd say Mr. Estes maybe lower forty, fifty feet of it would probably be fair.

Q. I'm sorry, can you say that again?

THE COURT: He said yes.

A. Yes.

Q. Okay, thank you. And how did you get to that area of the creek that we saw on the video. Can you chart your route?

A. Yeah, I walked in right there by L5. Walked up to Little Antietam Creek.

Q. So, you walked in the creek, up the creek, all the way through here?

A. Not all the way up there.

THE COURT: I think he was more at the - -

A. Not quite there. Down a little bit.

THE COURT: He was to the east of the bridge. He was east of the foot bridge.

A. Probably right there, yea.

Q. Okay.

THE COURT: Or west of the ford.

A. Yeah, I'd say right at the bottom of that forest conservation easement. I went up far enough to get the

pictures MDE asked me to get and then I left.

Q. And just so I'm clear to go up there you walked you were walking in the creek, correct?

A. Straight through the creek. Straight through the creek.

Q. And it was shallow enough for you to walk up there without needing to swim or float or anything?

A. Oh, yeah. I think one time I felt a little bit of water get in my hip waders and it was cool and that was about it. So, it was, you know.

Q. Okay, it never went above your hip waders?

A. One time. One time it did.

Q. When was that one time?

A. Probably, eh, right where the small letters are at the - - Right where the K is in creek at the end of the Antietam Creek, right about there.

Q. And there's been other times where you've been in Little Antietam Creek, correct?

A. Yeah, all my life.

Q. Okay. And in the past three years have there been repeated times where you've been walking or where you have walked in Little Antietam Creek? And specifically, when I'm saying Little Antietam Creek I'm talking about part of the boundary that we're discussion here today.

A. Well, I didn't do it between July 15 and April 11.

Q. Of what years?

A. Um, 2021 to 2022. I don't think I was in the creek any this year. Probably from 2020 through the end of that summer of 2020 I was in the creek pretty consistently down in the creek. I walked across the stones a lot. That the stone pathway by the railroad a lot that year. I was looking for stone monuments for an old roads to try to find them on some of the deeds I was looking at.

Q. And your children, they've been in the creek since 2020?

A. Yeah, they, you now, they really didn't. It bummed them out after Mr. Estes came down and you know got the dogs after them and they just - - We had a really happy family and we were, you know, trying to move to Keedysville. They were helping me with the house. They were helping me work on things and really, it really put pretty much ruined me and my wife's relationship, ruined my kids relationship. They've - - We've grown apart tremendously.

Q. And there have been times when Mr. Estes has requested that you not come onto his property or onto the creeks?

A. There have been times. And I've told him the creek is a public waterway and if the Court decides otherwise I will respect that.

Q. And the times in 2020, you had mentioned where you had been in the creek, I think you said on a regular basis, was that Little Antietam solely or was that also Spring Creek?

A. It was only one time in the Spring Creek and then in the time he saw me come up because I was concerned for my children and the dogs. I wanted to speak with Mr. Estes personally.

Q. So, then the other times, just so I'm clear, were in Little Antietam Creek?

A. The other time was the MDE investigation I was conducting.

Q. Okay. And these exhibit 11 the photo with the kayak, where were you standing when that picture was taken?

A. I would say close to where I've been calling the stake in the middle of the creek at the end of L5 generally in that area. Probably on land or in shallow water.

Q. Um, if I could see exhibit 29 please? This is my final question.

A. Can I supplement my answer to when I was in the

creek in 2020?

Q. Sure.

A. There's also a period where we had an agreement after, after joint peace orders that Mr. Estes discussed earlier on February 14, where I had given him Mr. Frederick's letter and we agreed to settle the property dispute through mediation first. That ended in May 9. And for that period of time, I didn't go anywhere in the water, anywhere in the creek. I obeyed the agreement I had with Mr. Estes to the "t". Just unfortunately Mr. Estes never contacted me to settle this and now it's become where we're at today unfortunately.

Q. Mr. Holder, I'm going to show you one of your exhibits, exhibit 29. Can you identify if you know what this is?

A. This is the MDE authorization to put a waterline in. Let's see.

Q. And it's a waterline in Little Antietam Creek in Keedysville?

A. Yeah, the Mt. Hebron Road waterline work, right here on this. It was given to me with the Town in conjunction with that US Army Corp of Engineers Permit to cross a navigable waters of the United States there at Mt. Hebron Road by John Burtner's property.

Q. And if you take a look on, well I guess this is

the first page, not the certification, but the second page of this exhibit, um, it says here that this is dealing correct with regular activity and non-title wetland buffer or expanded buffers, this is referring to this area being non-titled. Is that what it says?

A. Oh, I would think it would be non-title for sure. I mean the moon does have an effect on bodies of water but I don't think it's such an effect that it would be dispositive for what you're saying.

Q. Nothing further. I have no further questions, Your Honor.

END OF CROSS EXAMINATION

MS. PEEPLES: I have no questions.

THE COURT: Any re-direct examination of yourself?

A. No, I think I'm good. I appreciate that though.

THE COURT: Okay.

A. May I step down?

THE COURT: Yes, sir you may.

A. Thank you, Your Honor.

END OF TESTIMONY OF JUSTIN HOLDER

THE COURT: Alright, we are at 3:30. Now do you have other witnesses Mr. Holder?

MR. HOLDER: I do.

THE COURT: Remember we need to keep time for closing arguments.

MR. HOLDER: I should be - - My witnesses should be very brief, Your Honor.

THE COURT: Who do you want to call?

MR. HOLDER: Mark Pettijohn please.

TESTIMONY OF MARK PETTIJOHN

Mark Pettijohn, having been duly sworn, did testify as follows:

THE COURT: Sir, can you state your name?

A. Mark Lewis Pettijohn.

THE COURT: Can you spell your last name?

A. P-E-T-T-I-J-O-H-N.

THE COURT: What's your address Mr. Pettijohn?

A. 21813 Black Rock Lane, Hagerstown 21740.

THE COURT: Okay. Mr. Holder is going to ask you some questions. Make sure he finishes his question before you start answering, okay.

A. Okay.

THE COURT: Once he's done the other attorneys may have questions for you, okay?

A. Okay. Thank you.

THE COURT: Mr. Holder.

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Also Mr. Pettijohn if you hear somebody object stop testifying, allow us to argue the objection.

A. Okay.
Q. Is there a time where me and you met the first time we met do you remember that?
A. Yes.
Q. How long have we known each other?
A. About eleven years.
Q. Have we went kayaking together?
A. Yep.
Q. Have you done a lot of kayaking in your life?
A. Yeah, uh, yes. You want me to like elaborate or?
Q. Yeah, please.
A. I mean I've been kayaking since Boy Scouts pretty regularly, um, with my Dad and my children and you and your kids.
Q. Do you ever remember a day on Father's Day when we were kayaking at Creek Capon possibly a year and a half ago It rained at the end of the trip?
A. I do.
Q. Do you remember the approximate depth of the water for the eleven miles we kayaked?
A. It was shallow. I would say, I would say the average depth was maybe eight inches.
THE COURT: Where was this Mr. Holder?
Q. This would be the Great Cacapon River or I'm sorry. Was it the Capon River or the Great Cacapon River?

A. Cacapon River, West Virginia.

THE COURT: I remind you this is not a case about kayaking.

MR. HOLDER: I know.

Q. Have you ever floated on a creek near property that myself, Deena Holder go to and camp out?

A. Yes.

Q. Okay. When is the first time you floated in that area?

A. Uh, well it was shortly after you purchased the property and the water was fairly deep that year because we had a lot of rain. Um - -

Q. When you say fairly deep can you just generally. Over your boots?

A. It was every bit as deep as normal depth on the big Antietam that year.

Q. Okay.

A. I don’t know if that really helps but it was probably six to twelve inches deep.

Q. And later did it become shallower?

A. Oh, yeah. Yeah, later in the season, the Summer, Fall.

Q. And did you - - Have you floated the entire peninsula shaped property?

A. Yes.

Q. Okay. Have you seen other people float the entire peninsula shaped property?

A. Yes.

Q. Okay. That's all I have for you. Thank you.

END OF DIRECT EXAMINATION

THE COURT: Ms. Prawde, any questions?

MS. PRAWDE: Uh, just briefly.

CROSS EXAMINATION

BY MS. PRAWDE:

Q. Mr. Pettijohn, you had testified about the time when you floated on the creek shortly after the Holder's bought the property, is that correct?

A. That's right.

Q. And, can you specify sort of exactly where that was and I can try and orient you.

A. Okay.

Q. Um, so this is where the Spring Creek, I'm sorry.

THE COURT: He might not be familiar with all that. Just tell him where the Holder's property is.

Q. So, my understanding is the Holder's property is over in this area. (Ms. Prawde by the easel showing on map)

A. Is this the creek?

Q. This is Little Antietam Creek, correct.

THE COURT: Yes.

A. I do remember - - This is another creek that splits into it?

Q. Correct.

A. Yea, we probably started down here somewhere and went out over to this side of the property over here.

Q. Okay. And that was on one occasion?

A. Yes.

Q. Okay. And you didn't go anywhere into this other creek, correct?

A. No. No.

Q. And were there times when you were - - And when you say floating was that in a tube or however you were floating?

A. Inner tube.

Q. Okay. Were there times where it got pretty shallow where the tube was nearly touching the bottom or touching the bottom?

A. I mean, yeah, maybe in the turn there and around the bend, yeah.

Q. Okay. Alright, nothing further.

A. Or after the bend I guess, yeah.

END OF CROSS EXAMINATION

THE COURT: Ms. Peeples?

MS. PEEPLES: No questions, Your Honor.

THE COURT: Mr. Holder, and redirect?

MR. HOLDER: No, Your Honor.

THE COURT: Okay, Mr. Pettijohn, thank you for coming today. That's the end of your testimony. You are free to leave the courthouse.

WITNESS PETTIJOHN: Thank you.

MR. HOLDER: Thank you, Mr. Pettijohn.

WITNESS PETTIJOHN: Yep.

END OF TESTIMONY OF MARK PETTIJOHN

THE COURT: Mr. Holder.

MR. HOLDER: Are there anymore witnesses in the hall? I think there is someone.

THE COURT: Mr. Kauffman, let's see if there's anyone else in the hallway.

MR. KAUFFMAN: Okay.

MR. HOLDER: Should be Mr. Burtner.

THE COURT: Mr. Kauffman, we're looking for Mr. Burtner. Sir, if you'd like to leave your jacket back there you can. Come on in.

TESTIMONY OF JOHN BURTNER

John Burtner, having been duly sworn, did testify as follows:

THE COURT: Sir, can you state your name for me?

A. My name is Mr. John Burtner.

THE COURT: John Burtner. How do you spell Burtner sir?

A. B-U-R-T-N-E-R.

THE COURT: And what is your current address?

A. 39 Mt. Hebron Road, Keedysville 21756.

THE COURT: Mr. Holder is going to ask you some questions. Wait for him to finish his question before you start answering. Once he's finished the attorneys may have some questions for you or they may not, okay.

A. Okay.

DIRECT EXAMINATION

BY MR. HOLDER:

Q. Good afternoon. Thank you very much Mr. Burtner.

A. Yes, Mr. Holder.

Q. How long have you lived in Keedysville, Maryland?

A. Um, since 1969, what's that, about fifty years. I'm not very quick in the math.

Q. Okay. Is there a stream on your family farm there?

A. Yes.

Q. Does it generally feed to the Little Antietam Creek somewhere in Keedysville?

A. Yes it does.

Q. Okay. And at some point had you become concerned enough with the water level in that stream to come to the town meeting and talk about it?

A. Yes, I've been to the Keedysville Town Meeting

and to the Water Board meeting. It's a shared thing between Boonsboro and Keedysville.

Q. What was your concerns with the water level?

A. Um, I was surprised over the last four years that it would run dry, um, in the early summer, not the late summer. In the years I've farmed there I've seen it go dry one time from a natural drought. But it seemed like it began to become very systematic for late summer.

Q. Did you see any, any evidence or any reason why you would think it would go dry?

A. I never – - See, now you get into conjecture a little bit there and I hesitate to do that in court but I walked the streams as far as I could. Actually, went a little further. Did some trespassing up on Austin Flook or (unintelligible) hills. I had never found a hole or something like that that the water disappeared. It just, it just got slowing down to a trickle. As I visited the Boonsboro Park I took pictures of what I thought was evidence of a flower pump pumping water from the stream into their trout pond. Those are the things that I brought to the town meeting.

Q. So, potentially when they - - In their trout pond you're talking about is that behind the Boonsboro Library?

A. Yes, sir.

Q. You have any idea how many, how large it is, how many gallons it would be?

A. I don't, I don't know an answer to that Mr. Holder. I, I knew that there was a fountain runs in it all the time, pretty good size pond, bigger than this room by about twice.

Q. Okay, and did they build that pond about 2018 potentially?

A. I think so.

Q. Okay. Have you ever seen anybody playing, swimming in the creek near your farm?

A. I usually am encourage it, yeah I have. I have. I mean when kids come I try not to run them off.

Q. Okay. Is there anything else you can, evidence you think may be relevant to the water levels in that creek?

MS. PRAWDE: Objection.

THE COURT: Sustained.

MR. HOLDER: Okay, no further questions.

MR. HOLDER: I would like to move to admit Exhibit 6 from the Defense, the minutes from the Town of Keedysville.

THE COURT: Let's look at it. Do you have number 6, Madam Clerk?

CLERK: No, I don't have it.

THE COURT: You don't have 6?

CLERK: No.

MR. HOLDER: It might be - - What is it?

CLERK: The minutes are Exhibit 6 but I (inaudible).

BAILIFF: Here's 6. I have 6.

MR. HOLDER: I think the other one is there too. See if the other - - Yeah, there they are. The missing exhibits.

BAILIFF: And 7.

THE COURT: Madam Clerk, do you want number 7?

CLERK: Yes.

THE COURT: So, now you have a double, double 7, right?

CLERK: Yes.

THE COURT: Let me see number 6, Mr. Kauffman. And, so number 6 was minutes of the Mayor and Council Town of Keedysville July 6, 2022. So, I'm looking at the minutes. And Mr. Holder, if I look through this I'll find that Mr. Burtner had gone to the meeting?

MR. HOLDER: I believe it's the bottom of the first page.

A. I do remember I found out at that meeting that they used the Warrenfeltz Spring heavily between June and October.

THE COURT: These minutes do indicate that Mr.

Burtner spoke at the meeting that night. Is there any objection to number 6?

MS. PRAWDE: Yes, Your Honor. We object on the basis of relevancy. There's been no establishment that this spring where it's located if it has anything to do with water levels of the creeks as they're on the property that's in dispute or what effect if any effect they have on the, um, the creeks that are on the property.

THE COURT: What is the relevance of - -

MR. HOLDER: I believe - -

THE COURT: What I don't know is, is, is his creek that's saying that he says he's witnessing run dry, is that a spring run creek?

A. It's called Dog Run.

THE COURT: A different creek?

MR. HOLDER: Well, is that the creek that that would feed into the Antietam - - I asked him if it fed into the Antietam Creek and - -

THE COURT: I don't think you did.

A. That does feed into the Antietam Creek. It originates in Boonsboro.

THE COURT: Is it the same as the Spring Run Creek?

MR. HOLDER: It is. It's the Spring Run Creek.

THE COURT: It flows down from his property and then wraps down and it's all one creek?

MR. ESTES: I believe it begins in or somewhere up there Boonsboro, runs through his property then onto my property.

THE COURT: Okay. It's just a public record from the Town of Keedysville. I'll admit Defendant's Exhibit number 6.

(Defendant Holder's exhibit number 6 was admitted into evidence.)

MR. HOLDER: Thank you, Your Honor.

END OF DIRECT EXAMINATION

THE COURT: Ms. Prawde, any questions?

MS. PRAWDE: No questions.

THE COURT: Okay. No follow-up. Nothing Ms. Peeples, right?

MS. PEEPLES: No, Your Honor.

THE COURT: Okay. Mr. Burtner, you are free to go sir. Thank you for coming in today. I appreciate it.

WITNESS BURTNER: Yes.

MR. HOLDER: Thank you very much, Mr. Burtner.

END OF TESTIMONY OF JOHN BURTNER

THE COURT: Any other witnesses Mr. Holder?

MR. HOLDER: No, Your Honor. I've - - Defense rests.

THE COURT: Okay. Any rebuttal, Ms. Prawde?

MS. PRAWDE: No rebuttal, Your Honor.

THE COURT: Okay. Let's take five minutes to get yourselves organized and we'll come back from closing arguments.

(Whereupon at 3:46 p.m. Court was in recess and resumed at 3:58 p.m. and the following occurred in open court:)

THE COURT: Okay, we're back on the record, C-21-CV-20-430, Estes versus Holder, et. al. Are we ready for closing arguments?

MS. PRAWDE: Yes, Your Honor.

THE COURT: Ms. Prawde, do you wish to be heard?

MS. PRAWDE: Yes, Your Honor.

THE COURT: Go ahead.

MS. PRAWDE: Your Honor, Mr. Estes is seeking to enjoining the Holders from first of all going onto the bed of the Spring Creek and the Little Antietam Creek on his property. And that as has been defined by Plat 10955 and by Plat 9186 and the boundary line that has already been decided as part of this case and is not currently in dispute. So, he is seeking to enjoin the Holders from going onto the bed, those two creeks on his property specifically walking, wading or otherwise standing in those creeks. And secondly, he's also seeking to enjoin the Holders from entering into the non-creek bed land that is on Mr. Estes property and has already been

established in Summary Judgment. Again, he is not seeking to enjoin the Holders from any sort of use of, um, the water itself to the extent it is possible to use the water itself. He's not seeking to enjoin the Holders or members of the public from swimming, kayaking or canoeing in those areas that are on his property where someone could do so. However, the evidence has shown that in a large area of Spring Creek as well as Little Antietam Creek that much of that would not be possible for someone to swim or to kayak or to canoe or to take any sort of motorized boat or any type of floatation device down. Mr. Estes and his wife have both testified that it would not be possible to do any of those things on either Spring Creek or Little Antietam Creek on a continuous basis without needing to get up and walk any sort of float or you would not be able to float or swim or kayak or canoe or take a boat down those without it getting too shallow such that you would need to get up.

Mr. Estes has testified that he walks the creeks on a regular basis, often multiple times a day often with his dogs over the last twelve years. Mr. Estes - - Ms. Estes also testified that she regularly walks the creek at least once or twice a day. They are extremely familiar with the land and the creeks, both Spring Creek and Little Antietam Creek on their property as well as the

other land on their property including the water depths, the terrain. Mr. Estes had testified related to the rocks and the boulders that are prevalent in the lower part of or the southern part of Little Antietam Creek as well as to parts of the creek where land jets out or where there is debris or fallen or caught trees that block the waterway. They are well versed. They have lived this property, lived on this property for over a decade. They are the current owners. They currently walk the property as Mr. Estes has testified. He was there just last night. He was there this morning after a big storm. He is well aware and can testify to what those depths are as he has done. Regardless of whether he had a measuring stick out there he was able to testify about much of the waterway being ankle deep or much of the waterway at times perhaps coming up to his knees but he was able to give descriptions. Um, he testified that the bottom part, the most southern part of Little Antietam Creek that's on his property that with those rocks there, rocks there, he is often able to walk across it in his flipflops without them even getting wet. He talked about being able to wear his boots, which I believe he said were about calf high and that he's almost never getting water in his boots when he is walking in much of these creeks.

Your Honor, we are seeking an injunction as to further action by the Holders here. Um, and what is relevant is what this creek currently looks like, what the current conditions are of this creek, not what this creek was forty years ago perhaps. We have pictures that have been admitted into evidence that Mr. Estes has testified to related to the current condition of the creek, the current water levels of the creek, the different areas of Spring Creek and Little Antietam Creek and today what those areas are, not what children forty-five years ago where they were able to swim. He was able to provide testimony currently about what those conditions are.

And both Mr. Estes and Ms. Estes talked at length about the fact that they have never seen anyone kayak, canoe, take a boat down, take a float down, go swimming in any parts of Little Antietam Creek or Spring Creek in the twelve years that they've lived there.

As Your Honor has seen from one of the photos that were introduced you can clearly see the Estes house overlooking Spring Creek. It's right there. Ms. Estes is a homemaker. She is frequently home. They are - - If that was happening they would have seen it given their frequent walks, given how close they are in approximately to where these creeks are. As both Mr. Estes and Ms.

Estes has said this is their backyard. This is their property. This is what they consider to be their backyard.

Mr. Estes walks the Court through - - And the only times that the Estes have testified in their twelve years that they've lived on the property that they have seen anyone that was unfamiliar to them. In the creeks was one time Mr. Estes saw a man who was fishing with his son. Mr. Estes told the man it was private property that he would need to leave, directed him to somewhere else off of his property but then out of kindness invited him back. But Mr. Estes knew that this was now an invitee who he was giving permission on that one occurrence to fish there. That was the only time. And then there was testimony that they saw children, not the Holder's children, but other children on two occasions. That they've never seen any other children floating, swimming, frolicking in the creek whatsoever. And again, during those two occasions the Holders - - I'm sorry. The Estes told those children, again, this is private property. You know, there's a springhead if you want to go up there but this is, this is our property, you shouldn't be here. Obviously there's concerns about liability with these individuals are on land that belongs to the Estes, um, on their private property.

Mr. Estes walks the Court through in great detail Little Antietam Creek and Spring Creek. It was broken up into different sections so that he was able to describe the water depths and the terrain. I'm not going to repeat or go through all of his testimony there. But, again, Mr. Estes testified to only a couple or a few very small areas where the water gets deep enough where you could possibly swim or take a kayak but those are very small or narrow areas. I think he testified to, again, the area down by the railroad after you get past the very shallow area where the Holders are where he testified you would not be able to get through. I believe he said it was about fifty feet or so where it would possibly be deep enough. Again, he's not talking shoulder, shoulder deep but deep enough where someone could maybe take a kayak or swim. But again, that's only a very small fifty feet or so part of the property, part of the creek before he testified is shallows out again such that no one would be able to take any sort of vessel or swim without touching the creek bed without touching the creek bottom which is what we're here about today.

Additionally, the only other area is the point where Spring Creek and Little Antietam Creek where they meet. Again, that could possibly be deep enough for someone to swim or to take a kayak. Again, to the extent someone is

able that is not something that Mr. Estes is seeking to enjoin someone from. But that's very different from someone walking up and down a waterway from stopping, from standing there for spending a lot of time just in one spot on Mr. Estes property.

And talking a little bit about the four elements of injunction, Mr. Estes in the testimony here today and yesterday, has shown that the four elements needed for an injunction have been met. As to the first element as to the likelihood that Plaintiff will succeed on the merits. In terms of the land itself, the non-creek bed land, it is already been established, again, what the property line is in Summary Judgment. Any sort of walking onto that part of the of Mr. Estes land, any sort of youth doing anything on that part of Mr. Estes land would be considered a trespass. I don't think it - - It would be considered a trespass.

As to the land under the creek, again, the likelihood of success is for Mr. Estes there because of the non-navigability of Little Antietam Creek and Spring Creek. And I will talk a little bit more in detail about the non-navigability and how this does not pass the ebb and flow test that has been well used in the State of Maryland. But it's well established that individuals or the public only has a right to navigable, to navigate on

navigable waters and land. Here, again, as I will talk about a little bit more in my closing this was non-navigable, the areas of Little Antietam Creek and Spring Creek on Mr. Estes property.

As to the second element the irreputable injury the Court heard from Mr. Estes and from Ms. Estes about the value that they have placed on their privacy and on their property rights. It's established that these creeks run through their property. It's very easy without question as seen on Plat 9186 that Spring Creek runs directly through Mr. Estes property that he owns the land on both sides of that water. And then as to Little Antietam Creek it is also clear there may be one small area where the Holder, that the Uncle Eddie's property abuts but that is only again in one very small area. The rest of the Little Antietam Creek Mr. Estes owns based on the plats, based on the deeds, that have been reviewed and recognized by this Court and that are in the Land Records of Washington County Mr. Estes owns property on both sides of Little Antietam Creek.

The Estes both testified, again as I said, that they described this property as their backyard. Mr. Estes talked about yesterday why he wanted to live in an area like this, the importance that he places on his seclusion, his privacy, the importance of having a large

area of land given the work and enjoyment that he does in fostering and sheltering dogs and the ability to have these dogs run free on his property without concern about individuals walking or standing on his land or coming onto his land.

Ms. Estes talked about her concern about letting her dogs run on the property given the history of Mr. Holder being on the property, concerns about any future litigation despite, you know, as friendly as her dogs are, always a concern about something that could happen or alleged to have happened.

Ms. Estes talked today or testified today about her anxiety about Ms. Holder coming onto her property as well as her fear that she lives in about Mr. Holder walking onto her private property. They both mentioned the threatening email that Mr. Holder had sent to Mr. Estes with song lyrics, um, that they found extremely concerning and threatening to their persons, as well as the video that was shown today that was sent to Mr. Estes by Mr. Holder that they both have viewed as threatening to themselves and to their property and their property rights and the trees and the vegetation and their enjoyment of their own property.

This has been over three years since the Holders have moved on to the property and the Estes became aware of

them coming onto their land where they have lived with concern for their safety, for individuals coming onto their property and for the safety of their children.

Mr. Holder has admitted that he has come on to Mr. Estes property on multiple occasions. He testified that he did walk in Spring Creek as is shown in the video that the came up through Little Antietam Creek, um, went north and then went into Spring Creek towards Mr. Estes home. Actually, very close right by Mr. Estes home. And he also testified that he regularly in 2020 would walk Little Antietam Creek on a frequent and regular basis. And, again, that's walking in the creek standing in the creek as well as standing in Spring Creek.

THE COURT: Ms. Peeples (sic). I'm watching the clock, okay. I should have told you that we needed to put a little bit of a time - -

MS. PRAWDE: I should have checked, Your Honor, what time I started.

THE COURT: It's okay. You've been going on for about fifteen minutes. Okay.

MS. PRAWDE: Okay, thank you.

THE COURT: Do you have anything to add with respect to the law of the State of Maryland other than what you presented to me in opening statement in argument here on or first day and in your Bench Memorandum concerning

water laws or anything else you thought of that you didn't provide to me already?

MS. PRAWDE: Um, there is briefly a mention related to COMAR that I wanted to raise.

THE COURT: Okay.

MS. PRAWDE: And then a case law related to trespass and injunction that was not in there that I would like to raise but there would be nothing further.

THE COURT: Tell me about COMAR first.

MS. PRAWDE: Yes, Your Honor.

THE COURT: Quickly.

MS. PRAWDE: Um, so this is actually mentioned in the in our Supplemental Memo. So, Mr. Estes had made mention - - I'm sorry, Mr. Holder had made mention previously of COMAR 26.08.02.08.

THE COURT: Say it again.

MS. PRAWDE: I'm sorry. COMAR 26.08.02.08, um, which initially we had sort of disputed as to not being pertinent. It's a Department of Environment Regulation related to water quality. And in that it they the regulations designate different streams segments throughout Maryland and it classifies Little Antietam Creek specifically as a Class 3P. And then if you take a look at COMAR 26.08.02.02, um, which sort of explains what that actually means it says that a Class 3P is not

title hold water and public water supply. So, the point being is just that there is mention that Little Antietam Creek is non-title in the regulations.

THE COURT: Okay.

MS. PRAWDE: And then the only point or the other the additional case law is related to whether this type of action is something that the Court can order injunction for.

THE COURT: What's the case?

MS. PRAWDE: It is *Mahoney verse Devonshire*, it's 86 Md. App. 624, it's a 1991 case. Just the language there is where there is no reasonable doubt as to the title or the propriety of equitable action is evident. And equity court may set in may act in cases involving title and enjoin continuing trespasses or declare rights as to individuals ways. So, the Court can issue an injunction in a case like this to keep someone from continued or future trespass.

Mr. Holder here today his testimony was the last things we heard is he said he believes that he as a right to walk or stand on the property. He's not going to stop doing so unless the Court tells him not to. So, regardless of - -

THE COURT: That's not exactly what he said. He said he hasn't done it and he will follow whatever the Order -

- He hasn't done it recently. And he will follow whatever the Court order is. Okay.

MS. PRAWDE: Okay, I won't dispute the Court's recollection.

THE COURT: That's my recollection.

MS. PRAWDE: My recollection is he was not - - Okay.

THE COURT: Either way.

MS. PRAWDE: Either way. We think an injunction is necessary here - -

THE COURT: Okay.

MS. PRAWDE: - - because of that reason unless there is a court order. Just the fact the boundary line has been set that this would not stop a future trespass unless there is some sort of order in place.

THE COURT: Understood. Okay, thank you.

MS. PRAWDE: Again, as to the balance of conveniences just very briefly - -

THE COURT: Ms. Prawde. I'm pretty sure your argument is all the four factors fall in favor of your client, right?

MS. PRAWDE: Yes.

THE COURT: Good. I've heard what I need to hear. Thank you.

MS. PRAWDE: Thank you.

THE COURT: I'm just watching the clock.

MS. PRAWDE: My apologies.

THE COURT: That's okay. Ms. Peeples.

MS. PEEPLES: Your Honor, briefly, on behalf of Deena Holder and the thing that I really want to impress upon the Court and I would agree that Mr. Prawde - -

THE COURT: Ms. Prawde, you can sit.

MS. PEEPLES: - - do not disagree on the law. I will point out just to address one point in *Havre de Grace versus Harlow*, 129 Md. 265, just because the State says something is navigable does not mean it so. MDE has a whole list of navigable rivers. That doesn't mean that they are still or that they're not. Case law says that you still have to consider these factors.

The things that I wanted to point out to this Court are my purpose here on behalf of Mrs. Holder because Mrs. Holder is not an enjoining property owner. I think the testimony in this case is that twice she was on the property. You'll hear, and should Your Honor be inclined to grant at least the rights of the river in this case, that Mrs. Holder really has nothing to do with Uncle Eddie's. She is not an enjoining property owner. She has not been back to the property since this litigation began and if you were frankly to hear from her she would say that she has no interest in being on the property because she suffers as much anxiety as Mr. and Mrs.

Estes.

The point I want to make is she's not Justin Holder. The characterizations that she has been threatening in any way I don't think there has been although Ms. Estes testified that she got some anxiety that's Mr. Holder that's not Mrs. Holder they are - -

THE COURT: My recollection of Mr. Estes testimony is that she was actually cordial.

MS. PEEPLES: Yeah. So, the point being getting to the - -

THE COURT: But there's some relationship between Mrs. Holder and Uncle Eddie's.

MS. PEEPLES: I believe if Mr. Holder were to testify that he when Uncle Eddie's was formed she was a namesake and she was - -

THE COURT: And so was he. So was he. That's the - -

MS. PEEPLES: And that's not in the evidence.

THE COURT: That came out in the *Young* trial.

MS. PEEPLES: Correct.

THE COURT: That the members ultimately would be the children.

MS. PEEPLES: Correct.

THE COURT: Right. Okay, go ahead. I hear you. So, you're wanting me to look at Deena Holder as a separate

individual.

MS. PEEPLES: Correct. Because I really think that's important to this case and I really think that's important should this case proceed forward that you look at Mrs. Holder as a separate person from Mr. Holder.

To the extent that the Court has already found that boundary lines, I mean, it can be argued that until your Summary Judgment Order the parties believed that the boundary lines were in the middle of the creek and that they had the right to use it. So, trespass has to be an intentional act I believe. If you're, if you're looking to enjoin - -

THE COURT: It does.

MS. PEEPLES: - - and intentional act there has to be testimony that Mrs. Holder actually intentionally wantingly and willfully trespass in the river. They saw her in the stream. This was before Your Honor rendered a ruling about the boundary lines there's been no testimony that that she knew at the time that she was in the spring that she was over the boundary line. In fact, the Court hadn't even made a ruling. And I think that Your Honor should consider that particularly when there hasn't been since this litigation has ensued Mrs. Holder back in the creek. She is very aware of this action and what it's caused her and how the boundary lines come into play.

And once they've come into play she hasn't been back on the property. There's been no testimony of her being back on the property.

So, at least with respect to Mrs. Holder, I would say that an injunction would be improper. She's not a threat. She hasn't continued to trespass on the property. She hasn't engaged in actions that would harm Mr. or Mrs. Estes so, I mean, I think the testimony if you hear both sides it's consistent as to Ms. Holder's role. In fact, the Mrs. Estes testified today that the last time she saw them Mrs. Holder and her daughter were in the spring. They were picking up rocks. She advised them of the snapping turtles that was, it wasn't anything threatening. Mrs. Holder at that time believed that the property boundaries were different than what this Court has already determined. So, I think that you could argue upon a belief that you're entitled to be there granted ignorance of the law or ignorance of the boundary line is no excuse but there was a genuine belief that the property line was other than where this Court found it.

That being said, going down to the Public Trust Doctrine, which I've explained, the only things I want to point out to the Court are the tests of susceptibility of floating downstream under Havre de Grace. Just and you know I don't want to belabor the point but I also want to

say that if they thought that this was a public stream going back to Mrs. Holder and you're looking at what you believe streams are and things capable of floating and there was a picture of the daughter in a kayak the genuine belief that this was a navigable stream by Mrs. Holder, again, really goes to ignorance rather than intentional trespass.

And for those reasons I would argue that an injunction not be granted against Mrs. Holder. We're not here, I mean, that, the question of navigability goes to Your Honor and the only other thing I would say about that is nowhere in the case law, ebb and flow is mentioned in the case law, but Maryland really adopts this commerce type argument.

THE COURT: Without question.

MS. PEEPLES: Um, the point that I want to make is that nowhere in this commerce argument has it been established that the depth or lack of depth of the stream renders it non-navigable. And that's all I will say about that.

THE COURT: As it relates to the ability to transport commerce.

MS. PEEPLES: As it relates to the ability and that could even include floating logs down a stream.

THE COURT: I hear you. Okay.

MS. PEEPLES: Thank you, Your Honor.

MR. HOLDER: Thank you, Your Honor. I'll be brief.

THE COURT: Okay.

MR. HOLDER: Generally, I know you're talking about the four elements but I think those really apply to like a Preliminary Injunction. I think just basically an injunction. He has to have evidence that what he's seeking it's going to be irreputable harm. That's *El Bey verse Morrish Temple*, 765 A.2d, 132, 362 Md. 339 (2001). An injunction is a writ framed according to the circumstances of the case commanding an act which the Court regards as essential to justice or restraining an act which it is seems as contrary to equity and good conscience. *Downey Communications*, 110 Md. App page 515, 678a 2d at 66. Injunctive relief is relief prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Generally, it's preventative and it's protective. It's aimed at future acts. It's not intended to readdress past wrongs. *Carroll County Ethics Commission verse Lynn*, 119 Md. App 4958 703 A.2d 1338, 1342 to 43, (1998) case, altercation in the original.

So, I'm going to invoke what's called comparative hardship in this result okay. Mr. Estes wants, he's worried that the liability of his dogs if we get in the

creek he's going to get sued by us. But you can, I mean that's not necessarily the hardship that the Holder family is gonna face because if we want to kayak and we touch one blade of ground Mr. Estes is going to have us in here, enjoined. It's effectively what it's doing is saying this creek property that you guys bought you don't get to use the creek anymore. If you want to use it, use it over here where it's so deep it's over your head, you kids can't get - - The kids like to get in and wade around. They like to be able to get out, get on the tube, get off, go to the little islands, go hunt for shells and fish. That's what the kids like to do. They, that's the first place my daughter went (unintelligible).

So, it would just be very hard on our family. And, I think that Mr. Estes bought the property with notice of the public rights. I think that they're on record I think that his plat even says that there's public rights of record it's subject to. I think that common to riparian owners is use of the water. I think that the public right to fish the waters and dry the shores is the right that the State of Maryland when construing the waters of the State as the whole flood plane relies on. Mr. Estes has not been able to bring forth any evidence that any of those rights have ever been terminated, extinguished or abandoned. And I believe that perfect

title to an easement and gross if you look at *Garret verse Gray*, 258 Md. 363, Md (1970) has been, has been established. Looking at that case basically the Hutzells testified for the entire time, you know, they were at the property they used it however they wanted to use it. They walked up to the spring. Nobody ever gave them permission. They just did it. Basically it's (unintelligible) principle to establish right of way by prescription is necessary to produce an adverse exclusive and uninterrupted use of a way for twenty years. Term adverse user means without a license. Where however a person uses a right of way for twenty years unexplained is fair to presume that its use has been under a claim of right unless it appears to have been by permission. In other words, the use of the way, which it's saying way, I mean roadway, waterway, whatever. Whenever one sees fit over the land of another without asking the owner of the land to show that the use of the way is by license of contract it would be on the burden of the Plaintiff to show that there was permission. He failed to do that. And, you know, Judge Alvey said in *Thomas verse Board* that there's another rule of law which sometimes is an option and seems to blend and reflect and overlap the rule as to acceptance by a user of an offer or dedication. The second rule of that is one that's now

relied on here. Is its uninterrupted use of the public way may give the public and irrevocable right? This result follows as because an intention to dedicate is inclusively presumed but because of the lapse of the statutory period twenty years a perfect title by prescription to an easement in gross vest in the public. And that's Frank Title Real Property Real and Lease Hold Estates 1912 page 203 American Law Property. And Tiffany Real Property 3rd Edition.

And lastly, public use requires that all use persons must have an equal right to the use and that it must be in common and upon the common terms however few the number that avail themselves. And that's *People ex rel. Tuohy verse City of Chicago* and that's cited in the *Garrett verse Gray* case. And it's generally the case, you know, I was looking at the only other case that may be applicable that the Court may be helpful with is *Kirby verse Hook*, 701 A.2d 397 and that's Maryland Court of Appeals (1997). At page 403 the Court is discussing an alternative ground for its judgment in the Court of Appeals quoting 78 Am.Jur.2d, Waters section 177, at pages 624-25 it explained that, "Where the water flowing from a spring establishes a permanent stream or watercourse upon or across the adjoining land, riparian rights attach thereto in favor of the owners of such

land, and the owners of the land upon which the spring arises likewise has only the rights of a riparian owner in the waters of the spring…But where the waters of a spring do not form a watercourse which leaves the lands upon which the spring arises, but sink back into the earth at the spring spread over the surrounding land, or flow in a course entirely upon the lands upon which they arise, disappearing before reaching adjoining land, the spring ordinarily regarded as the exclusive property of the owner of the land on which it is situated, who has all the rights incident thereto that one might have to any other species of the property."

So, there is some law that if you abut on a spring branch you know you have rights to that spring and into the water in the spring. And that would be non-navigable waters. Spring branch can't be navigable.

THE COURT: How would - - What's that?

MR. HOLDER: I said a spring branch can't be navigable. A spring flowing across people's property. But they (unintelligible) have riparian right.

THE COURT: With respect to this spring branch where it comes out of the spring and then flows westward to the Antietam Creek Mr. Estes without question owns both sides of that, right? Once it leaves the county property.

MR. HOLDER: Yeah, well - -

THE COURT: Okay, so - -

MR. HOLDER: Well, yeah, I mean according to your Order it does, yeah, he does.

THE COURT: No. Even, even if I had put it down the middle, even if I had put the property line down the middle of the creek, where would the Uncle Eddie's property have touched the spring branch?

MR. HOLDER: Well because - -

THE COURT: Such that it would become a riparian owner it would have riparian rights to the spring branch water.

MR. HOLDER: Because Mr. - - When I look in the land records there's no title to that line where his other lot is. It went straight across and then the spring branch was the old property line and then that piece in the middle there's not, he doesn't have record title of that.

THE COURT: I'm asking the relevance of that riparian case you just cited what is the relevance of that riparian case to this case?

MR. HOLDER: Because the spring branch - - Well, I mean if you're saying once the spring branch hits the Little Antietam Creek it's no longer a spring branch probably not. Other than, other than a spring branch has - -

THE COURT: I think once it hits the Antietam Creek

it is no longer the spring branch. It is the Antietam Creek.

MR. HOLDER: And the fact that it grants riparian rights to a spring branch shows the body of water that is getting repaired. It doesn't necessarily have to be navigable. I would think it would have a little relevance maybe (unintelligible) around in there.

THE COURT: Okay.

MR. HOLDER: And then lastly, I would just remind the Court to, I feel that you should take Mr. Estes' testimony with a grain of salt. He has a tendency to sort of put Affidavits in that suit him at the time, you know, say things that seem to help in the time and then such as even in his MSJ argument in August 2nd, he argued that hey, it doesn't have to be continuous use of this property. It can be for adverse use. It can be, you can have long gaps and even the fact that the fact witnesses may have had some gaps there's been continuous use of this spring branch by the Uncle Eddie's predecessors since the Hutzells owned it back in the 60's. And that's pretty common to the, to the area. I think that we've established prescription to walk from that property to the spring branch through the creek by you know just twenty years of adverse use.

I would close my arguments on that, Your Honor. I

appreciate your time and consideration here.

THE COURT: Okay. Thank you, sir.

MS. PRAWDE: Just a few points, Your Honor, very briefly.

THE COURT: Sure.

MS. PRAWDE: Okay, just first of all as to Ms. Holder and what her frame of mind is. That is simply just a representation by her counsel here. There's been no evidence put on today by anyone, in particular by Ms. Holder about what her frame of mind was whether she did or did not know what the property boundaries was. Counsel can stand up and say she had no idea during the time she walked there what the property boundary was. But again, there's been no actual testimony. That's not in evidence here. And whether she is aligned, not aligned, any sort of permission given, not given to Mr. Holder that Ms. Holder's counsel has represented in closing. Again, there has been no testimony about what that relationship is. That's not in evidence. That should not be considered by the Court.

Um, just very briefly, this is clearly, this is not commerce that any sort of transport here would not be for commerce. Um, this is not the Potomac River. This is not the Chesapeake Bay. These are not boats that are out there fishing. These are not boats that are out there

collecting oysters, fishing for oysters. That's not what this is. This is a very, very small creek, two small creeks that are on Mr. Estes' property that he purposely moved to for the privacy, the seclusion for those small creeks that run through his property. And the ability to fully enjoy them as part of his private property.

I would just highlight again navigability that (unintelligible) to commerce the real test is the most recent cases in Maryland which are in our Memorandum Opinion make clear that whether water is navigable is determined by the ebb and flow of the tides. Mr. Estes and Ms. Holder - - Mr. Estes and Ms. Estes both testified that they've never seen any sort of ebb and flow. They know what that is. There's no title action. I walked Mr. Estes through multiple parts of the plat, going through different areas, no evidence of any tides.

As to the argument that Mr. Holder made as to prescription, again, we would just raise the Woodland's exception here. I'm not going to fully repeat it but just in circumstances where a property is unimposed, unimproved, and in general state of nature the landowner does not need to object to passing through. Here much of this property is in a state of nature, unimproved, unenclosed such that the Woodlands exception would be applicable.

And for those reasons, Your Honor, we would request that Injunctive Relief be entered here and that specifically that the injunctive order be as specified at the very start of my closing. Thank you.

THE COURT: Okay. Thank you all. There's a lot of exhibits and there's a fair amount of written material concerning the House Bills, the Army Corp of Engineers. I think it is worth my time to review that material before making a determination in this case. And so, I will be taking this matter under advisement. I will get an Opinion and Order out to you as soon as I can or I will call you back for an Order on the record. Thank you.

END OF PROCEEDINGS AT 4:40 P.M.

Digitally signed by Linde M. Cessna

DIGITALLY SIGNED CERTIFICATE

I HEREBY CERTIFY that I reported verbatim by electronic device the proceedings in the matter of, *Benjamin Estes v. Justin Holder, et al.*, Case No. C-21-CV-20-430, Volume 2 – Day 2, in the Circuit Court for Washington County, on December 16, 2022, before the Honorable Andrew F. Wilkinson, Judge.

I further certify that the proceedings were transcribed by me to the best of my ability in a complete and accurate manner, and page numbers 1 through 277 constitute the official transcript of the proceedings.

In witness whereof, I have affixed my signature this 14th day of March, 2023.

Linde M. Cessna

Linde M. Cessna

Court Reporter